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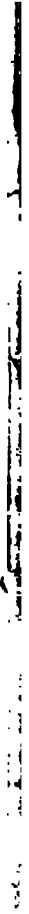


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W. L. Phillips

A

Treatise

ON THE

LAW OF INSURANCE.

BY WILLARD PHILLIPS.

Boston :

PUBLISHED BY WELLS AND LILLY, NO. 98, COURT-STREET.

Treadwell's Power Press.

1823.

DISTRICT OF MASSACHUSETTS, TO WIT:

District Clerk's Office.

BE IT REMEMBERED, That on the eighth day of August, A. D. 1823, in the forty-eighth year of the Independence of the United States of America, Willard Phillips, of the said district, has deposited in this office the title of a book, the right whereof he claims as author and proprietor, in the words following, viz.: 'A Treatise on the Law of Insurance, by Willard Phillips:' in conformity to the act of the congress of the United States, entitled, 'An act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned;' and also to an act, entitled, 'An act, supplementary to an act, entitled, an act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned; and extending the benefits thereof to the arts of designing, engraving, and etching historical and other prints.'

JNO. W. DAVIS,

Clerk of the District of Massachusetts.

MASSACHUSETTS
CLERK
JNO. W. DAVIS

P R E F A C E.

At the time of beginning this treatise, it was intended that it should include the whole subject of insurance, not excepting the legal proceedings, but it was found to be impracticable to pursue the work upon this plan, without extending it to more than one volume. Under these circumstances, it was thought expedient to omit the legal proceedings, as being the part of the subject, of the least practical importance, since the legal proceedings upon a policy, do not differ materially from those upon other written contracts.

The different parts of the subject of insurance are so blended together, and implicated with each other, as to render a simple and methodical arrangement very difficult, and, in the opinion of some persons, even impossible. The perplexity which seems, in some degree, to belong to the subject, was increased, in consequence of the numerous points and decisions, which had not been embodied in any elementary work. If it shall be found that the difficulties, arising from these causes, have not been wholly overcome, and that some cases and points are not inserted in the places, where they might have been most appropriately introduced, I hope that the very great difficulty of disentangling, and reducing to complete order, such multifarious and complicated materials, will be regarded as some apology for any defect of this sort.

In collecting and arranging the great mass of materials, which have been for a long time accumulating in this science, it will be found, no doubt, that some points, and even cases, of an importance sufficient to entitle them to a place in the work, have been

overlooked ; and it is not improbable, that, in some instances, cases have been misunderstood, and opinions inaccurately represented. I have endeavoured to prevent such omissions and mistakes from being very numerous.

Although I have not hesitated to express my opinions and reasons without reserve, and without, at the same time, testifying my respect for those from whom I have differed, not thinking that the occasion required any declaration of this sort ; yet I have not thought it necessary, in all cases, to state what I understood to be the law. In many instances, the diverse opinions of judges, and of writers, are given without any comment, or any intimation in regard to the preponderance of authority or reasons, in favour of either side of a question. It would doubtless have been more prudent, on my part, and perhaps not less acceptable to my readers, had I more frequently pursued this course.

Where different opinions are thus cited in regard to particular doctrines, and so, in many cases, where opinions are cited without any comment, or reference to opposite opinions, it is left wholly to the judgment of the reader, to adopt or reject the doctrine in dispute, or the opinion stated, as he may be determined by the reasons or authority. I do not wish to have the mere circumstance of stating a doctrine or practice, considered as necessarily implying my own opinion respecting it. In many cases the reasons stated by the judges or writers quoted, and the comparative authority on the different sides of a question, leave the mind free from any doubt, in judging of what is the law. Some parts of the subject of insurance have not, as yet, been pursued beyond the mere rudiments, and still rest upon broken hints, and general and hasty suggestions ; in such cases, to arrive at any satisfactory conclusions, would require elaborate investigation, and a longer argument and more discursive speculation, than can conveniently find a place in an elementary work.

In considering a proposition to be law, or not to be so, the mind is necessarily determined by the reasons and the authority, in its favour, or against it. If the inquiry relates to a disputed point of which a particular court has jurisdiction, the question is, not merely what reasons or weight of authority there may be in favour of either side, but, also, what would probably be the decision of that particular tribunal. In such a case, and for the purpose of the inquiry, the authority of that tribunal outweighs all opposite authority and reasons.

PREFACE.

When the inquiry does not relate to the probable decision of any one tribunal, different persons must necessarily adopt different modes of determining what is law. If a person supposes himself not to be skilful and well informed, in regard to the subject under consideration, he can only adopt the opinion of the judge or writer, whose judgment he thinks it the most safe to follow. He must decide upon authority merely, and be implicitly guided by the opinions of those men whom he supposes to have had the best means, and to have been the most capable, of judging, and to have formed their opinions the most deliberately, and after the most thorough investigation. In proportion as a person considers himself skilful and competent to judge, he is the less determined by mere authority. But very few persons consider themselves to be so perfectly masters of any branch of legal science, as to throw off all restraint of authority; and those who are, with good reason, the most confident of their skill and knowledge, are usually, in forming their opinions, influenced, more or less, by authority, according to the particular subject of inquiry. In most cases it is necessary to take into consideration what has been practised and decided, since the mere fact that a thing has been decided or practised in a certain manner, is, in itself, a reason, of greater or less weight, for continuing the same practice, or adhering to the established doctrine.

In many branches of the law, precedent, as such, and independently of the reasons upon which it was formed, is entitled to great respect, and is not unfrequently conclusive of the law. But where a decision or opinion rests upon a certain principle, the applications of which, in different instances, must be consistent, and also conformable to other acknowledged principles; precedent has less weight. Concurrent decisions, however numerous they may be, cannot establish a conclusion, which is drawn from insufficient premises; or cause inconsistent propositions to be law. A very great part of the law of insurance consists of deductions from certain principles, which constitute a science, in regard to which, mere precedent cannot have very great influence, since deductions inaccurately made, lead to contradictions and inconsistencies, which no authority can vindicate. In some branches of this subject, precedent is of authority and weight, but the greater part of the doctrines comprehended in this science, must stand exclusively upon the reasons and fixed principles, from which they are inferred. The inferences which may be clearly drawn from those principles, are not

made to be law, and cannot cease to be law, in consequence of any number of decisions, by whatever authority they may be supported. Notwithstanding a diversity of opinions and judgments, those doctrines still remain the unvarying and unalterable law, and they need but to be presented with the reasons on which they depend, to receive the assent of a mind which is capable of perceiving their mutual connection and dependency. No branch of law can more properly be denominated a science, than insurance; and since this contract is substantially the same in different countries, and continues to be the same now that it was formerly, the decisions of courts, whether ancient or modern, and the opinions and reasonings of writers, whether American, English, Italian, or French, are equally applicable to it.

Although much has been written, and a very considerable number of cases decided, upon the subject of losses, still this branch of insurance is not very satisfactorily investigated, and settled, in the books. I have endeavoured to acquaint myself more fully with it, by communication with experienced and eminent insurers. In this respect I am under great obligations to several gentlemen; in particular, to CHRISTIAN MAYER, Esq. President of the Patapsco Insurance Company of Baltimore; and especially to the late Hon. GEORGE CABOT, President of the Boston Marine Insurance Company, who, during his life, took a friendly interest in my labours, and was always ready, in the most obliging manner, to discuss the subjects of inquiry which I proposed, and gave me, as far as he could, all the advantage of his scientific views, accurate discrimination, and long experience. I do not, however, wish that any particular parts of the work should be understood to have the sanction of his authority, nor that any of the other gentlemen above alluded to, should be considered responsible for any of the doctrines laid down, or any of the statements respecting usage and practice.

W. P.

Boston, August 7th, 1823.

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TREATISE

ON

The Law of Insurance.

CHAPTER I.

OF THE CONTRACT OF INSURANCE.

Section 1. *What Insurance is.*

INSURANCE is a contract whereby, for a stipulated consideration, one party undertakes to indemnify the other against certain risks. The party undertaking to make the indemnity, is called the *insurer* or *underwriter*; the party to be indemnified, the *assured* or *insured*. The agreed consideration is called a *premium*; the instrument by which the contract is made, a *policy*; the events and causes of loss insured against, *risks* or *perils*; and the property or rights of the assured, in respect to which he is liable to loss, the *subject* or *insurable interest*. Insurance defined.

This contract is sometimes defined as extending only to property afloat upon the ocean, or employed in trade; (a) which makes it a maritime, or at most, a mercantile contract. But it has a wider use, and comprehends the risks of death, fire, drawing a blank in a lottery, and others not necessarily connected with trade; and it is so described by the more modern writers. (b)

(a) So Emerigon describes it from Le Guidon, and cites Stypmannus, c. 7. n. 262, as extending it to property transported. Westket. tit. Ins. 2. confines it to sea-risks, and says, 'he offers his definition as more adequate and complete than any he had met with, and comprehending those of all the esteemed authors who had treated of it.' Magens considers it as connected with trade.

(b) Justice Lawrence says, 'the contract of insurance is applicable to protect men against uncertain events which may in anywise be of disadvantage to them.' 2 N. R. 301.
Lucena v.
Craufurd.

Since, however, it is most frequently entered into as a mercantile contract, and the greater part of the principles of insurance apply to it as such, this form of the contract is always understood to be intended, when the contrary is not expressed.

As to the essential part of this contract, it ~~does~~ not differ from a bond of indemnity, or a guaranty of a debt, since the obligor or guarantor takes upon himself certain risks, to which the obligee or creditor would otherwise be exposed. The only difference is in names, and the form of the instrument, the consideration for an insurance being always called a *premium*, and the instrument containing the terms of the contract, a *policy*, which is usually made in a form peculiar to this species of contract.

Gaming policies, and policies on interest.

Doug. 470.

Insurances are usually described to be of two kinds, namely, policies on interest and gaming policies, in which latter the person insured is not required to have any interest in the thing insured, and needs not to be exposed to any risk against which the policy is intended to protect him. 'Gaming policies,' says Lord Mansfield, 'are mere games of hazard, like the casting of a die.' They are wagers made in the form of policies, which in other respects, differ, no less than other wagers, from the contract of insurance. A wagering policy does not seem properly to belong to the subject of insurance, (b) since it is prohibited by positive law in many countries, and is considered to be

(b) Emerigon, c. 1. s. 1. says, a wager in the form of insurance, resembles it only in name. Christian, on the contrary, says, that 'insurance is in effect nothing more than a wager, for the underwriter, who insures at five *per cent.* receives five pounds to return one hundred, upon the contingency of a certain event, and it is precisely the same in its consequences, as if he had betted a wager of ninety-five pounds to five, that the ship arrives safe, or that a certain event does not happen.' 2 Bl. Com. 459. n.

Where wagers in general are enforced as legal contracts, wagers on the arrival of a ship are sometimes declared to be unlawful, as against public policy; for a community, it is said, has a great interest in its commerce, and it is wrong to permit any one to have an interest that may make him desire that a ship should be wrecked, as the cupidity of men cannot be trusted in such a case. Emer. c. 1. s. 1. Such wagers have, however, been allowed in some parts of Italy. Roc. de Assec. n. 73; Poth. par Estrangin, No. 11. n. By the French Ordinance, a. 22. h. t. wagers in the form of insurance are prohibited; so by the regulations of Amsterdam, a. 13. 2 Mag. 132. No. 524; and those of Genoa, Casar. disc. 7 and 15; of Stockholm, a. 2. s. 7. 2 Mag. 257. No. 1029; of Prussia, c. 6. a. 10. 2 Mag. 189. No. 780; of Middelburg, a. 2. 2 Mag. 68. No. 161.

Wagering policies were held to be lawful, and were very much in use in England before 1746, when they were prohibited, by the Stat. 19. Geo. II. cap. 37. 'because the permitting of them had been productive of many pernicious practices, whereby great numbers of ships with their cargoes had been fraudulently lost; and had encouraged prohibited and clandestine trades, to the diminution of the revenue, and the great detriment of fair traders.' In Massachusetts, wagering policies are considered void, though there is no statute against them; (1) in New York they are held to be legal. (2)

(1) *Amory v. Gilman*, 2 Mass. Rep. 1.
(2) *Juhel v. Church*, 2 Johns. Cas. 333.

illegal, without any special provision, in others, and is very little used where it is held to be lawful; and especially since it is distinguished by one essential circumstance, from what is properly an insurance, in as much as insurance is universally considered to be a contract of *indemnity*, which a wager is not. The subject of gaming policies will therefore be noticed only for the purpose of distinguishing what policies belong to this class.

The contract of insurance, then, agrees in substance with a bond or any other contract of indemnity or guaranty, but differs in form; whereas it agrees with a wagering policy in form, but differs in its character, its object, and the rules by which it is interpreted.

Section 2. The Form of the Contract.

Where the subject, the relation of the parties, and the object of the contract, continue to be the same, some degree of uniformity is naturally preserved in the form of the contract. In England the ancient form of the policy has been adhered to very strictly, in the United States this instrument has been frequently examined by skilful persons with a view to making alterations; the general form of it has, however, been pretty uniformly preserved, though particular clauses have been altered, and others added; yet these clauses are in general no more free from uncertainty than those belonging to the old form. 'A policy of insurance has been considered as an obscure, incoherent,(1) and very strange instrument.'(2) But the obscurity and uncertainty complained of, does not probably arise, altogether from any imperfection in the policy that might be remedied. (a) A contract embracing so many interests and parties, and liable to be affected by so many events, cannot but be subject to some difficulties of construction, however skilfully it may be drawn.

The English law provides that no insurance shall be made on any ship belonging to the king or his subjects, 'interest or no interest, or without further proof of interest than the policy, or by way of gaming, or without the benefit of salvage.'(3) This statute has been interpreted not to make void a policy, containing the provision that a loss is to be paid, 'interest or no interest,' or 'without further proof of interest than the policy;'(4) but only to make those provisions void, and leave the party to prove his interest. It does not therefore prohibit any particular form of the policy, nor enact that any particular form of words shall

The Old form preserved in England, but less strictly in U. S.

(1) Per Buller, J. 4 T.R. 210.
(2) Per Mansfield, C. J. 4 Taunt. 380.

Gaming policies.

(3) 19 Geo. II. c. 37.

(4) Grant v. Parkinson, Park, 402; Hodgson v. Glover, 6 East, 316.

(5) Marsden v. Reid, 3 East, 579.
(6) 5 Cranch, 342.
(7) 6 Cranch, 45.
(8) 1 Bur. 347.
(9) Doug. 270.

(a) Mr. Justice Lawrence says, 'It is wonderful that policies should be drawn with so much laxity;' (5) Chief Justice Marshall, 'Policies of insurance are generally the most informal instruments which are brought into courts of justice;' (6) and again 'the contract of insurance is very loosely drawn.' (7) Lord Mansfield said, 'the instrument is conceived in an inaccurate form of words;' (8) but that 'length of time and a variety of decisions have reduced it to a certainty.' (9)

conclusively determine the instrument to be a wagering policy. And the law is the same in the United States, as to the distinction between a *wager* and an *insurance*. Whether it be a wager or not, depends on the whole instrument; and though the assured have an interest in the subject and the risk, he may still wager respecting them. (1) As, where a policy was, that a ship should save her passage to China that season, it was held to be a wager, though the insured had *some goods* on board. (2) The expressions mentioned in the above statute, or others equivalent to them, are commonly used in wagering policies, yet, a great variety of expressions might be used in this sort of policy, according to the subject to which it relates, and the event upon which the wager depends. It often happens in insurances intended to be on interest, that the assured has in fact no interest exposed to the risks enumerated, yet these are not therefore wagering policies, and he is entitled to have his premium returned. To make a policy a wager, it must appear to be such on the face of it. (3)

Accordingly, though the instrument contain phrases and provisions usually belonging to a wagering policy, still if it appear on the whole to be a contract of indemnity, by which the claims of the assured are to be commensurate with the damage he may sustain, and if it can be executed as such, the provisions contained in it, that are against law or inconsistent with the general tenor of the instrument, will be controlled and made void. Where it was stipulated that, in case of loss, no proof of interest should be required, and that there should be no return of premium made, yet the court decided that those stipulations were void, and there should be proof of interest, and return of premium, as in policies of the usual form. (4) But where it was agreed in a policy that a total loss should be paid if the ship did not return, and that no partial loss should be paid, and no benefit of salvage claimed, and no proof of interest, except the policy, required; it was held to be a wager on the return of the ship, for the contract provided that in such case the whole sum insured should be paid, and by the other parts of the policy, as well as this, it appeared plainly that it was not intended by the parties to be a contract of indemnity, under which the sum to be paid by the insurer, was to be measured by the damage sustained by the assured. (5)

If the policy appear on the face of it not to be intended by the parties as a contract of indemnity, and if it appear that the event insured against would not, were it to happen, cause any loss to the assured; or if it might cause a loss to him, and yet the sum to be paid by the insurer is not to be governed by such loss, or bear any proportion to it, such a policy is a wager.

Code de Com.
h. t. a. 143.

The French code prescribes that the contract of insurance shall be made in writing, bearing date on the day when it is subscribed, expressing whether made before or after noon, and that it shall contain other particulars specified, and that no blank space shall be left in the instrument.

Whether insurance must be in writing.

In Great Britain and the United States, the law does not directly and positively prescribe the form of this contract, or the

(1) *Juhel v. Church*, 2 Johns. Cas. 333.

(2) *Kent v. Bird, Cowp.* 583. See also *Kulen Kemp v. Vigne*, 1 T. R. 305.

(3) *Cousins v. Nantes, & al.* 3 Taunt. 513; *Williams v. Smith*, 2 Caines, 13.

(4) *Hemmenway v. Eaton*, 13 Mass. Rep. 108. See also *Clendinning & al. v. Church*, 3 Caines, 141; *Grant v. Parkinson, Park*, 402.

(5) *Juhel v. Church*, 2 Johns. Cas. 333.

mode in which it is to be executed. It has been held in England by Judges Eyre, Ashurst and Wilson, sitting as commissioners in chancery, that an insurance not in writing would be void as an evasion of the stamp duty. (1) And the English statutes requiring the assured in certain cases to be named in the policy, imply that the contract is in writing. (2) Mr. Justice Tilghman of Pennsylvania expressed a doubt, whether a valid insurance could be made otherwise than in writing; (3) and the contract is universally understood and spoken of, as being written.

Insurance is most frequently made by an incorporated company; and 'such a company is the mere creature of the act to which it owes its existence, and may be said to be precisely what the incorporating act has made it, to derive all its powers from that act, and to be capable of exerting its faculties only in the manner which that act authorizes.' (4) To make a contract of insurance binding upon such a company, therefore, it must be executed in pursuance of its charter.

(1) *Morgan v. Mather*, 2 Ves. Jun. 18.
(2) 25 Geo. III. c. 44. 28 Geo. III. c. 56.
(3) *Smith v. Odlin*, 4 Yates, 468.

(4) *Head and Amory v. Prov. Ins. Co.* 2 Cranch, 167.

Section 3. *An Agreement for Insurance.*

It is often desirable to conclude an agreement for insurance immediately, lest some intelligence should induce one party or the other to recede. Accordingly it is the practice with some of the English insurers, on agreeing upon a risk, to subscribe a *slip*, or short memorandum of the proposed insurance, (5) which, according to the statement of one of a special jury, and so probably a man practically acquainted with the course of business, is considered to be binding on the parties; but Lord Kenyon held that it was not legally binding for want of a stamp, (6) and Lord Ellenborough gave, in effect, the same opinion. (7) The reason here given why this *slip*, signed by the insurer, is not a valid agreement in England, shows that it would be so in the United States, while they have no stamp act, provided it contained the terms of the contract sufficiently expressed. It is not the general practice in the United States for insurers to subscribe any slip, though a memorandum of the contract is sometimes subscribed previously to executing the policy. The terms of the insurance being agreed upon, and nothing remaining but to make out the policy, the parties consider the risk to be assumed and the premium due, from that time. (a) But it does not appear that the parties

Agreement for Insurance.

(5) *Marsh. Ins.* 236. n.

(6) *Rogers v. M'Carthy*, Park, 45. n.
(7) *Marsden v. Reid*, 3 East, 572.

(a) The President of an insurance company in Providence, giving his testimony, said, 'in effecting or settling a policy, the assent of the parties to doing a thing, is in all respects as binding as the thing done, according to the usage and practice among underwriters.' And the practice and understanding of insurers generally, is according to this statement.

2 Cranch, 164

At Marseilles instead of a slip signed by the insurer, the broker made out a note containing an abstract of the risk and terms, and the underwriter subscribed to the policy in blank, leaving it to be filled up by the broker according to the note. But this note constituted no part of the contract, nor could it be used to correct any mistake in the policy. Signing policies in blank is contrary to the French

Emer. c. 2. s. 4.

M'Culloch v. Eagle Ins. Co. Sup. Jud. C. Mass. Essex, Nov. 1822; the case will probably appear 1 Pickering's Rep. See 1 M. & S. 95; 2 Ves. Jun. 118; Adams v. Lindsall, 1 B. & A. 681; Cooke v. Oxley, 3 T. R. 653.

are legally bound until the policy is filled up, or some memorandum of the contract signed, and either actually or constructively delivered to the assured. Where the parties make an agreement for insurance by correspondence through the mail, it has been made a question what will amount to a completion of the agreement. Mr. M'Culloch of Kennebunk wrote to an insurance company in Boston, for the terms on which they would insure his vessel. The company answered, on the first of January, that they would take the risk proposed, at a premium of two and a half per cent. M'Culloch received this letter on the third of January, and the same day wrote in reply, that he wished to have a policy filled on the terms proposed, for 2500 or 3000 dollars, as the company should prefer. On the second of January, the company wrote that they declined taking the risk, but M'Culloch did not receive this letter, until after he had sent by mail his letter accepting their proposal. It was held that the company could not be bound, until they received notice of M'Culloch's acceptance of their proposal, and that no contract was made in this case, since they had revoked their proposal before receiving such notice.

Section 4. The usual Stipulations of the Contract.

A marine policy contains, in general, that the underwriters cause the assured to be insured in a certain sum, on ship, cargo, freight, or profits, for a certain voyage, or time, against the enumerated risks; for which they confess themselves to have been paid a premium at a certain rate per cent. These are the leading and substantial parts of every policy, and in connexion with these are introduced all the provisions, stipulations, conditions, and warranties.

It is an implied condition of every policy, and of the same force as if it were expressly inserted in the instrument, that the assured, at the time of procuring the policy, shall fairly disclose to the underwriters every fact material to the risk, which is exclusively within his knowledge, and which is not embraced by some agreement in the policy; and if this condition is not complied with, the policy is void.

Deviation.

It is always an implied condition, that the voyage shall be pursued by the usual route and in the usual manner.

Seaworthiness.

The assured is understood, by the act of procuring the policy, to warrant that the vessel is sea-worthy, and in every respect fit for the voyage or service on which she is employed. This agreement is uniformly a part of the contract, though it is never expressed in the policy.

Express warranties.

The warranties most frequently expressed in the policy, are, that the ship sailed or will sail, on or before a certain day; that

Ordinance, and is disapproved of by Emerigon as exposing insurers to frauds, since they often found that the policy did not correspond to the broker's note.

she carries a certain number of guns; is manned by such a crew; carries a license; or that the vessel or cargo is owned by Englishmen, Americans, or people of some particular country; or is neutral.

In respect to the risks, it is often provided that the assured shall have liberty to touch at certain ports out of the usual course of the voyage, or to take letters of marque and cruise, or to carry the goods on deck, or to carry simulated papers. **Liberty to touch, &c.**

In the United States it is customary to insert an agreement, that in case of any prior insurance on the same subject, the policy shall be valid only to the amount of the deficiency of such prior insurance to cover the full value of the property, and that the insurer will return the premium on the excess over such value; and that the rights and obligations of the parties shall not be affected by any subsequent insurance. **Prior policy.**

It is agreed in many policies, that in case of loss, the assured shall abate one or two per cent. that is, if a loss happen to the amount of a hundred dollars, the insurer shall be liable to pay only ninety-eight or ninety-nine. **Abatement.**

Though the insurer generally acknowledges in the policy that he has been paid the premium, yet the payment is in fact generally made in the promissory negotiable note of the assured, and accordingly, an agreement is inserted, that in case of loss, the insurer may first deduct the amount of the premium note, if unpaid, or that he may deduct the amount of premiums due to him from the assured on account of the same and other policies. **Receipt for premium.**

To exclude demands for small amounts, and avoid the trouble of adjusting trifling losses, it is stipulated that no loss under three, or five, or some other rate per cent. on the amount insured, shall be paid, unless in case of a general average. **Losses under 5 per cent.**

Certain kinds of merchandize go under the name of *memorandum articles*, from the circumstance of their having been introduced under a *memorandum* or *N. B.* Among these articles are most usually comprehended, corn or grain, fish, salt, fruit, flour, hemp, flax, hides, skins, sugar, flaxseed, bread, tobacco, rice, and other articles that are esteemed perishable in their own nature; and it is universally stipulated, in both English and American policies, that on some of these articles more or less, particularly the six or seven first, no loss shall be paid, except in case of their entire destruction, or in case of a general average, or, according to many policies, in case of the stranding of the ship. In some policies it is stipulated that, on the other of these articles, the insurers shall not be liable to pay any loss under seven per cent. or some other agreed rate, which is higher than the rate of loss at which they are liable on merchandize generally; in other policies, this last stipulation is omitted. **Memorandum articles and excepted losses.**

In New-York, Philadelphia, and Baltimore, it is stipulated in policies on the vessel, that if the vessel, after a regular survey, shall be condemned, on account of being unsound or rotten, the insurers shall not be bound to pay their subscriptions. **If ship condemned as rotten.**

Contraband trade.	In the same places, the policies on the cargo exempt the insurer from loss by prohibited trade or trade in articles contraband of war.
Half per cent. of premium retained.	In some policies it is agreed, and it is always understood, that in case of a return of premium, the insurer shall retain one half per cent. upon the sum insured, which amounts in some cases to one half, or two thirds of the whole premium, and in others to a very small part of it, according as the premium is at a lower or higher rate. This is considered to be a compensation to him for the trouble of making a contract, which he, on his part, is ready to fulfil, but of which the assured neglects to avail himself.
Policy to be of as much force, &c.	It is agreed in the English policies, that the instrument shall be of as much force and effect, as the surest writing or policy of insurance heretofore made in Lombard-Street or elsewhere in London. Some policies, after the enumeration of the risks, contain a provision that the policy is against all other perils and losses that may come to the hurt or detriment of the subject; in others this provision is qualified so as to extend only to the losses and misfortunes for which insurers are liable, according to the customs of the place where the policy is made.
All other perils.	
Time when loss payable.	In some policies it is stipulated that a loss shall be paid in thirty or sixty days, or some other fixed time, after proof of it is produced to the underwriters; others do not contain this stipulation.
Reference of disputes.	It is the general practice to provide that any dispute arising on the policy, shall be referred to arbitrators mutually chosen by the parties; but this agreement has no legal effect either in the United States or Great Britain, and in France the same agreement has very little force.
Kill v. Hollister, 1 Wils. 149. Thompson v. Charnock, 8 T. R. 139.	

Section 5. What makes a part of the Contract.

Correspondence and communications.	The correspondence of the parties, or communications that take place between them, previously to executing the policy, do not constitute a part of the contract, to the same effect, as if they were inserted in the policy. Thus where the agent of the owner of the property insured, left a memorandum at the office, signed by himself, 'that the policy was to take effect, if no insurance should be made by the owner elsewhere,' which was shown to the underwriters at the time of signing, and the owner did in fact make insurance abroad, though not to the full value of the property; yet this memorandum was held not to be any part of the contract, and could not be taken advantage of by the underwriters to avoid payment of a loss. Chief Justice Parker giving the opinion of the court, said, that 'Policies, though not under seal, have nevertheless ever been deemed instruments of a solemn nature, and subject to most of the rules of evidence which govern in the case of specialties. The policy itself is considered to be the contract between the parties, and whatever proposals are made, or conversations had, prior to the subscription, they are to
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be considered as waived, if not inserted in the policy or contained in a memorandum annexed to it.⁽¹⁾ And a correspondence concerning an insurance previously to making it, in which the voyage is described, will not control the description of the voyage in the policy,^(a) nor will a paper that was shown to the underwriters at the time of signing, in which the number of men and guns on board was stated,⁽²⁾ or in which it was stated that the vessel had deviated from the voyage described in the policy before the insurance was effected;⁽³⁾ nor are words spoken by the parties at the time of signing the policy, of the same effect as if they had been inserted in the policy; as where the underwriter at the time of signing, said, he would not be held if the vessel did not sail by a certain day,⁽⁴⁾ or a broker told the underwriters that the goods were not on board of a certain ship,⁽⁵⁾ or the assured said the ship was American.⁽⁶⁾ But though the proposal or order for insurance, or a paper shown, or words spoken at the time of signing, are not a part of the contract to the same purpose, as if the words spoken or contained in the proposal, or paper shown, had been inserted in the policy, still the contract may be affected by them, if they are such as to induce the underwriter to take the risk, and have not been waived in the policy. A previous statement or communication is waived, and to be totally disregarded, if the matter to which it related, is made a part of the written contract.

Whether a condition, warranty, or other agreement, implied, but not expressed in the policy, may be superseded by a verbal or written statement, made and assented to, at the time of signing the policy—that is, whether an agreement that would otherwise be an implied part of the contract, may cease to be so, in consequence of a representation—is a question concerning which there seems to be some room for doubt. In case of a policy containing liberty ‘to touch at the Cape de Verd Islands,’ but not expressing for what purpose, the assured proved that a letter was exhibited to the insurers at the time of subscribing the policy, stating that the object of touching was ‘to take in salt.’ Mansfield, C. J. ‘If the underwriter knows a thing by express communication, it is the same as if he had notice by the general usage.’⁽⁷⁾ That is to say, if there had been a usage to touch for this purpose, the liberty to touch would by implication include the customary purpose. And since a usage is said by Lord Mansfield, and all judges since his time, to be an implied part of the policy, the above decision makes an express representation equivalent to an agreement implied in the policy. Mr. Justice Story considered a representation that the ship had a letter of marque to be substantially equivalent to an express statement of the fact in the policy.⁽⁸⁾ But this might be on the ground that insuring as a letter of marque merely, and with-

(1) *Higginson v. Dall*, 13 Mass. Rep. 98.

(2) *Pawson v. Barnevelt*, Doug. 12. n.
(3) *Redman v. Lowdon*, 5 Taunt. 462.

(4) *Whitney & al. v. Haven*, 13 Mass. Rep. 172.

(5) *Weston v. Emea*, 1 Taunt. 115.
(6) *Atherton v. Brown*, 14 Mass. Rep. 152.

Whether a representation controls an implied condition or warranty.

(7) *Urquhart v. Barnard*, 1 Taunt. 450.

(8) *Haven v. Holland*, 2 Mason’s Rep.

(a) *Vandervoort v. Smith*, 2 Caines, 155; *Stevens v. Bev. Ins. Co. S. J. C. Mass. Essex*, Nov. 1822. It is however said, in one case, that the written order for insurance will control the policy. *Norris v. Ins. Co. of N. A.*; 3 Yates 84. for which 1 Atk. 547, is cited.

out any liberty to cruise, &c. does not authorize any act, which might not be done, though this fact were not inserted in the policy.

That an implied condition or warranty may be *explained and qualified*, by the express communications that pass between the parties at the time of making the contract, appears from the above cases, and also from others.⁽¹⁾

(1) Haywood & al. v. Rodgers, 4 East. 590; Walden v. Firem. Ins. Co. 12 Johns. 128.

But whether an implied condition or agreement usually comprehended in the contract, may be excluded from it entirely, in consequence of verbal communications between the parties, is not distinctly decided. Some cases favour the doctrine that it could not be so excluded. It is an implied condition of the policy, that the voyage shall be pursued by the usual route, and in the usual manner, and if it be not so pursued, the insurer is discharged from subsequent losses, though the voyage may still come literally within the description in the policy. And it has been held that though the assured expressly disclosed to the insurer that the vessel had deviated, or would deviate, from the usual course of the voyage, but still keeping the same port of destination in view, the assured was still bound by the condition, and that the verbal understanding between the parties had not the effect of setting aside the condition; (2) 'no instance can be found,' says Chief Justice Parker, 'where the knowledge of the underwriter that a deviation was intended, has been set up as an excuse for such deviation.'⁽³⁾

(2) Redman v. Lowdon, 5 Taunt. 462.

(3) Wiggins & al. v. Boardman, 14 Mass. Rep. 15. See also Weston v. Emes, 1 Taunt. 115.

(4) Cockran v. Retberg, & al. 3 Esp. 121; De Hahn v. Hartley, 1 T. R. 343; Guerlain v. Col. Ins. Co. 7 Johns. 527, but the margin is referred to in the policy; Bean v. Stupart, Doug. 11.

(5) Jenks v. Hallet, 1 Caines, 60.

(6) Kenyon & al. v. Berthon, Doug. 12. n.

Whatever is contained in the policy, or other instrument, or written upon it, at the time of signing, is a part of the contract, and is adopted by the signature; whether the words are in the margin,⁽⁴⁾ and so even, it seems, when put in with consent after signing,⁽⁵⁾ or written transversely,⁽⁶⁾ or endorsed.^(a)

A policy, as well as other instruments, may refer to records, or other papers, and so make them a part of the written contract; as where in a policy under seal against fire, the insurers agreed to pay the loss 'according to the tenor of their printed proposals,' it was objected that a foreign paper could not be thus incorporated into a sealed instrument, the court held that it might be so, and that it was too clear to admit of a doubt.^(b)

Verbal declarations even may by a provision in the policy be made to form, directly, a part of the contract; as where the policy is on goods, *thereafter to be declared*, the subsequent declaration of the assured, though not made in writing, will determine the subject to which the policy is to attach. And the

(a) Mod. Cas. 237, cited Jac. L. Dic. tit. Deed III.; Harris v. Eagle Fire Co. 5 Johns. 368, though the words and figures endorsed are referred to in the policy in this case; Warwick v. Scott, 4 Camp. 62, where the regulations of the insurance company and the conditions on which they insured were endorsed.

(b) Routledge v. Burrell & al. 1 H. B. 254; Oldman & al. v. Bewicke & al. 2 H. B. 577. n.; Wood & al. v. Worsley, 2 H. B. 574; Worsley v. Wood, 6 T. R. 710; Tarleton & al. v. Staniforth, & al. 5 T. R. 695.

assured having made a declaration, by mistake, that the goods were on board of a certain ship, on board of which he had no goods, was permitted to make a second declaration. Lord Ellenborough said, it was a 'corrigible mistake,' and that 'the first declaration did not form any part of the contract.'⁽¹⁾

(1) Robinson
v. Touray, 3
Camp. 158.
1 M. & S. 217

Section 6. *Renewal of the Contract.*

Policies against fire frequently contain a provision for their renewal or continuance, by the payment of the premium within a certain time.⁽²⁾

Without a provision of this sort, it would require as much form to renew a policy as to make it originally.

(2) Tarleton,
v. al. v. Stan-
niforth & al. 5
T. R. 695.

Section 7. *Assignment of the Policy.*

It is a general rule that the assignment of a contract must be made with as much formality, or by an instrument of as high a nature, as the contract itself. The policies of some fire insurance companies contain a provision for their assignment on reasonable notice, and others, that no assignment shall be valid without the assent of the underwriters.⁽³⁾

If the property insured be conveyed, and afterwards a loss happen, and after the loss the policy be assigned to the purchaser of the property, the assignment will be ineffectual in respect to such loss, and neither the party originally insured nor his assignee can recover the loss; the original assured can recover nothing, for, not being owner of the property at the time of the loss, he has sustained no injury; nor can the assignee recover any thing, because, at the time of the loss, he was not the party insured.⁽⁵⁾

Mr. Marshall says, 'a policy like every other *chose in action*, may be assigned in equity,'⁽⁶⁾ by which he doubtless means, that if the property insured be assigned or conveyed, the policy may be assigned to the same person, without the consent of the insurers, so as to give him a right of action in the name of the assignor, leaving to the underwriter all right of set-off, and objections to a claim for a loss, which they would have had against the assignor; this being the construction of an equitable assignment of other *choses in action*. This opinion coincides with diverse cases.⁽⁷⁾

A suit being commenced in equity on a policy which seems to have been assigned without the assent of the underwriters, was dismissed, on the ground that *there was an adequate remedy at law.*^(a) It has been expressly decided in Massachusetts, that an assignment of a policy, 'without the assent of the underwriter, vested an equitable interest in the assignee.'^(b) And the

(3) Marsh.
801.
This condi-
tion is annex-
ed to some, at
least, of the
American po-
licies.

(5) Lynch &
al. v. Dalzell,
& al. 4
Brown's Parl.
Cas. Tomlin's
Ed. 431; the
Saddler's Co.
v. Badcock &
al. 2 Atk. 554.
(6) p. 800.

(7) Gourdon
v. Ins. Co. of
N. A. 3 Yates,
327, S. C. 1
Bin. 430;
Rousset v.
same, 1 Bin.
429, S. C.;
Condy's,
Marsh. 287 n.
Delany v.
Stodart, 1 T.
R. 22.

(a) Carter & al. v. United Ins. Co. 1 Johns. Chan. Rep. 463.

(b) Wakefield v. Martin & trs. 3 Mass. Rep. 558. See also 1 Atk. 547; and Dhegetoft & al. v. Lond. Ass. Co. Moseley's Rep. 83.

That a court of chancery will, upon sufficient proof, correct a mistake in filling up the policy, has been repeatedly decided.⁽¹⁾ Lord Chancellor Hardwicke says, 'No doubt this court has jurisdiction to relieve in regard to a plain mistake in contracts in writing, as well as against frauds in contracts, so that if reduced into writing contrary to the intent of the parties, on proper proof, that would be rectified. But there ought to be the strongest proof possible.'⁽²⁾ And the Supreme Court of the United States appears to assume, very distinctly, that a court of equity may correct a mistake in a policy.⁽³⁾

(1) Implied by Lord Eldon, 2 N. R. 322; Livingston, J. Graves & al. v. Mar. Ins. Co. 2 Caines, 343; & Washington J. Hogan v. Del. Ins. Co. Condry's Marsh. 345. n.
(2) Henkle v. Roy. Ex. Ass. Co. 1 Ves. 317.
(3) Graves & al. v. Boston Mar. Ins. Co. 2 Cranch, 441. See also Baker v. Paine, 1 Ves. 456.

As to liberal construction of the policy.
(4) Lethulier's Case, 2 Salk. 443, A. D. 1692.
(5) Lee, C. J. in Tierney v. Etherington, 1 Bur. 348, A. D. 1743.
(6) Park, 49, & per Yates, 2 Bin. 373.

Policy to be construed like any other instrument.
(7) v. 1. p. 663. c. 12. s. 45.

(8) Agailar & al. v. Rodgers, 7 T. R. 419.

(9) Robertson & al. v. French, 4 East, 135.

(10) Per Marshall, C. J. 3 Cranch, 235. Cooke v. Graham.

Section 10. Usage affects the construction of the Policy.

The subject matter of marine insurance and other mercantile contracts, makes it necessary to go out of the written instrument in order to interpret it, more frequently than in most other contracts. It was early laid down as a rule, that, in determining the meaning of a policy, regard must be had to the course of the trade to which it relates.⁽⁴⁾ Hence a notion seems to have been entertained, that the principles of construing this contract, are not the same that are applicable to others. It is said that 'policies are to be construed largely,'⁽⁵⁾ according to the intention of the parties, and for the indemnity of the assured and the advancement of trade.⁽⁶⁾

The principles of construction are, however, the same in regard to these, and all other contracts in writing, in which the intention of the parties is always to be sought for in the instrument itself. 'The contract,' says Emerigon, 'is a law from which it is not allowable to depart, under the pretext of a pretended equity, which would only introduce uncertainty and inconsistency into decisions.'⁽⁷⁾ Lord Kenyon says, 'it would be attended with great mischief and inconvenience, if, in construing contracts of this kind, we were not to decide according to the words used by the contracting parties;'⁽⁸⁾ and Lord Ellenborough, 'that the same rule of construction which applies to other instruments, applies equally to this, viz. that it is to be construed according to the sense and meaning, as collected in the first place from the terms used in it, which terms are to be understood in their plain, ordinary, and popular sense, unless they have generally in respect to the subject matter, as by the known usage of trade, or the like, acquired a peculiar sense distinct from the popular sense of the same words, or unless the context evidently points out that they must in the particular instance, and in order to effectuate the immediate intention of the parties, be understood in some other special and peculiar sense.'⁽⁹⁾ The principle of construing according to the intention, applies to other instruments as well as policies. 'There are many cases on the construction of bonds, where the letter of the condition has been departed from, to carry into effect the intention of the parties.'⁽¹⁰⁾ That policies of insurance are governed by the same laws of con-

struction, as other written contracts, has been many times decided, either directly or in effect.(1)

The meaning of the words and phrases in policies as well as other instruments, must in general be ascertained by going out of the instrument. Where the assured undertook that his vessel should have a sea-letter on board; to ascertain what the parties meant, or must be supposed to have meant by a *sea-letter*, it was necessary to resort to the public statutes and treaties, or, if this document was not defined, and its form prescribed in these, the construction of the stipulation was to be determined by the common usage and understanding among men of business.(2)

Parties have been allowed to prove that words have a meaning in policies different from that in which they are commonly used. Where a policy provided that no other than a total loss should be paid on *roots*, and a loss which was not total happened on a quantity of sarsaparilla, the court was of opinion that it should be paid, notwithstanding it came literally within the exception, it being shown that the provision was introduced in reference to trade, principally from Connecticut to the West Indies, in *beets* and other garden roots, which were green and perishable, whereas the sarsaparilla being a dry, hard root, is less liable to decay from its internal qualities, than merchandize in general, and had never been considered, in practice, as one of the articles excepted in the policy.(3)(a)

A question arose under the agreement, that the underwriter should not be liable for a partial loss on *corn*, whether *rice* was comprehended in that term, and, Sir James Mansfield said, that no one reading the policy would be apprised that *rice* was intended, yet 'if a clear usage to the contrary were shown,' *rice* might be considered as comprehended in the word *corn* in policies of insurance.(4)

Insurance being made 'from London to any port in the *Baltic*,' the vessel sailed for Revel in the Gulf of Finland, a distinct sea from the *Baltic*, among geographers, but as it was comprehended in the *Baltic* in commercial language, the court gave this extent to the term in the policy.(5) And where a policy was 'at and from *Amelia Island*,' and the vessel loaded at *Tigre Island*, it being customary for vessels nominally bound to and from *Amelia Island*, to discharge and load there, the court held that

(a) The memorandum in this policy was, that '*roots and all other articles perishable in their own nature*,' should be free from average unless general, and it would not seem to be a forced construction to qualify the expression, *roots* by what follows, and restrain it to such roots only as are *perishable in their own nature*. And without resorting to this support, the case seems to go very far towards allowing the parties to show that their contract is different from what it evidently appears to be on the face of it. The court was prevented probably from resorting to the subsequent words, out of respect to one of its former decisions, viz. *Barker v. Ludlow*, 2. Johns. Cas. 289, in which it is said that the 'subsequent words are not applicable to the articles previously enumerated, nor can they repel the implication arising from the enumeration of them.'

(1) *Per Kent*, J. *Goix v. Low*, 1 Johns. Cas. 341; *Marsh. Ins.* 304; *Per Livingston*, J. *Mumford v. Hallet*, 1 Johns. 439; and *Marshall*, C. J. *Graves v. Bost. Mar. Ins. Co.* 2 Cranch, 419. See also *Hogan v. Del. Ins. Co.* *Condy's Marsh.* 345. n; *Sleight v. Rhinelander & al.* 1 Johns. 192. S. C. in Err. 2 Johns. 531, and see also 2 John. 351.

(2) *Sleight v. Rhinelander*, 1 Johns. 192. 2 id. 531.

(3) *Coit & al. v. Col. Ins. Co.* 7 Johns. 385.

(4) *Scott v. Bourdillion*, 2 N. R. 213.

(5) *Uhde v. Walters*, 3 Camp. 16.

(1) *Moxon v. Atkins*, 3 Camp. 200.

taking a cargo on board at Tigre Island, and sailing from thence, satisfied the terms of the policy,(1) for this being the voyage usually made by vessels said to sail from Amelia Island, must have been the voyage intended in the policy.

(2) *Cockran v. Retberg*, 3 Esp. 121.

The obvious meaning of the policy was controlled by usage, in a case where the shipper was to allow something for demurrage, unless the cargo should be discharged in fourteen days; Lord Eldon said, 'if it were left to the construction of law, he should be of opinion that holidays were to be included, but if the fact was clearly made out that the fourteen days meant working-days,' according to usage and common acceptance, the contract should receive that construction.(2)

(3) *Speyer v. N. York Ins. Co.* 3 Johns. 88.

Goods being insured to Bordeaux, with an agreement not to abandon if the ship should be 'turned away,' the vessel was forbidden by the French government to enter the Garonne; as it appeared that, by the common usage and understanding, the *turning away* contemplated by the parties was a turning away by blockade, the court did not consider the ship to be turned away within the meaning of the policy.(3)

(4) *Constable v. Noble*, 2 Taunt. 403.

Goods insured at and from Lyme, were put on board of the vessel at Bridport harbour, a member of the port of Lyme, about nine miles distant from that place. The court said, if the assured could prove any usage for vessels to load at Bridport, under a policy from Lyme, it might make the insurance good. No such usage could however be proved.(4)

(5) *De Longuemere v. N. York F. Ins. Co.* 10 Johns. 120.

(6) *S. C. id.* 120.

(7) *Cockey v. Atkinson*, 3 B. & A. 460.

In the case of a policy 'from New-York to the *port* of Sisal,' there being no *port* belonging to Sisal in the proper sense of the word, as it has no harbour or haven where ships may lie in safety, but they lie off in an open roadstead, while discharging, and loading, the court gave a construction according to the fact, and considered the voyage in the policy, to be a voyage to Sisal, as such a voyage is ordinarily performed, and must have been understood by the parties.(5) And where the policy was 'from the last *port* of lading,' and the vessel completed her lading off Angostura which has properly no *port* or harbour, yet the court decided that it should be considered the 'last port of lading' within the terms of the policy.(6) So an insurance of a vessel for four months from St. Michael's to any *port or ports*, is held to be equivalent to an insurance to any *place or places*, and the sailing to a place that had no *port*, and where vessels are discharged in an open roadstead, was held to be within the policy.(7)

Usage of the trade impliedly referred to in the contract.

(8) *Noble & al. v. Kenno-way*, Doug. 513.

(9) *Per Lord Mansfield in Mason v. Skurray*, Park, 191

An underwriter is supposed to be acquainted with the usages of the trade which he insures.(8) Every man who contracts under a usage, does it as if the point of usage was inserted in the contract in terms.(9) It was the uniform and well known practice of the British East India Company, to reserve in the charterparty the liberty of employing the vessel on an intermediate voyage from one port to another in India. Accordingly, under a policy on a ship employed by the company, though nothing was said of an intermediate voyage in the policy, yet, because the voyage was described to be an India voyage, it was held, that the underwriter should be presumed to know what was incident to such a voyage, and that the construction of the con-

tract should be the same as if liberty had been expressly reserved in the policy to make such intermediate voyage.(1)

A vessel was insured either 'with or without letter of marque,' the intention of course being to have the liberty of using it, but to what extent, whether in acting on the defensive, or in giving chase to vessels that hove in sight, or in cruising, were questions not settled by the obvious and general import of the words. Lord Ellenborough said, 'it may be material to ascertain in what manner parties to contracts containing this form of words have acted upon them in former instances, and whether they have obtained, as between assureds and assurers, any known and definite import.'(2)

Goods insured 'till they were safely landed at Leghorn,' were landed at the Lazaretto, about half a mile from the city of Leghorn, as was customary in regard to goods of the kind insured, where a loss happened upon them, before the period of quarantine had expired, and permission could be had to transport them to the city. Marshall, C. J. giving the opinion of the court, says, 'whatever might be the effect, if the establishment of the Lazaretto, and the laws of quarantine, had been of so recent date, as not to have been in the contemplation of the parties to the contract, this cause may well be decided upon the usage found in this case, a usage of ancient date and general notoriety. When the parties stipulated that the adventure should continue till the goods were landed in safety at Leghorn, they knew that the place of landing was the Lazaretto, and that the landing would be made under the direction and control of the local authority. This then, must be the landing contemplated in the policy. It is the landing which terminates the risk. Had the parties intended to continue the risk, during the continuance of the goods in the Lazaretto, they would have inserted in the policy, words manifesting that intention.'(3)

'In all matters of trade,' says Justice Buller, 'usage is a sacred thing,(4) and in policies of insurance in particular, a great latitude of construction as to usage, has been admitted;' and he even says, that usage not only explains, but also controls the policy.(5) It is a well established principle, however, that usage cannot control and set aside, what appears by the policy to be the plain intention of the parties. Where goods were insured 'till landed,' it was proposed to show that this expression meant till the ship was moored twenty-four hours in safety, but Lord Kenyon would not permit it, because it was inconsistent with the meaning of the policy, which was too clearly expressed to admit of any such explanation.(6) And the Supreme Court of Massachusetts held that 'the usage of no class of citizens could be sustained in opposition to the principles of law;' the question being whether a policy should receive a construction conformable to the uniform usage in Boston, where it was effected.(7) And where it was proposed to introduce the *slip*, for the purpose of showing what kind of policy the parties intended to make, and that it was different from that which was actually

(1) *Salvador v. Hopkins*, 3 Bur. 1707.

(2) 6 East, 207. *Parr v. Anderson*.

(3) *Gracie v. Mar. Ins. Co.* 8 Cranch, 75.

(4) *Newman v. Cazalet*, Park, 630.

(5) *Long v. Allen*, Park, 589.

(6) *Parkinson v. Collier*, Park, 470.

(7) *Homer v. Dorr*, 10 Mass. Rep. 26.

made, Lord Mansfield would not permit it, for the contract itself was a conclusive proof of the intention of the parties; and though a usage should be proved that the *ship* was to be considered as a part of the contract, it could not avail to control or set aside the policy.⁽¹⁾ And Mr. Justice Kent said, 'I know of no rule better established, than that parol evidence shall not be admitted to disannul, or substantially vary, or extend, a written instrument.'⁽²⁾

- (1) *Pawson v. Barnevelt*, Doug. 12. n.
 (2) *New York Ins. Co. v. Thomas*, 3 Johns. Cas. 1.
 See also *Mumford v. Hallett*, 1 Johns. 439;
Cheriot v. Barker, 2 Johns. 351;
Hogan v. Del. Ins. Co.
 1 Condry's Marsh. 345.
 n.; *Vandervoort & al. v. Smith*, 2 Caines, 162;
Higginson v. Dall, 13 Mass. Rep. 96.
 (3) *Smith v. Wright*, 1 Caines, 45.
 (4) *Trott & al. v. Wood*, 1 Gal. 444.
 (5) *Marsh. Ins.* 186.
 (6) *Noble v. Kennoway*, Doug. 510.
 (7) *Lord Ellenborough in Robertson & al. v. French*, 4 East, 130.
S. P. Coater v. Phœn. Ins. Co. Wharton's Dig. 329, h. t. no. 118.
 (8) 4 East, 140. See also *Robinson v. Tobin*, 1 Stark. 336.

A usage, to be binding upon a party, must be definite, general, uniform, and well known. 'The true test of a usage,' says the Supreme Court of New York, 'is its having existed a sufficient length of time to have become generally known.'⁽³⁾ To make a usage obligatory on the parties 'it should,' says Mr. Justice Story, 'be so well settled, that persons engaged in a trade must be considered as contracting with reference to it.'⁽⁴⁾ In a case of insurance from Liverpool to Jamaica, the ship put into the Isle of Man; it appearing that ships bound on this voyage sometimes put in there, but not usually, it was held not to be a usage.⁽⁵⁾ Where a trade had existed and been carried on in the same manner for three years, and another similar trade had been carried on in the same way for many years, it constituted a usage. And Lord Mansfield said, 'it is no matter if the usage has only been for a year.'⁽⁶⁾

Section 11. The written, controls the printed part of the Policy.

The policy being a printed form with the blanks filled up in writing, 'if there is any doubt upon the sense and meaning of the whole, the words superadded in writing are entitled to have a greater effect attributed to them than the printed words, inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning.'⁽⁷⁾

Words written in the margin of the policy apply indefinitely to the whole of the policy, and are considered as controlling the sense of the parts of the printed policy to which they apply. 'As for instance, where the word *ship* is written in the margin of a policy; or *freight*, or *goods*; in such case the general terms of the policy, applicable to other subjects besides the particular one mentioned in the margin, are thereby considered as narrowed in point of construction to that one.'⁽⁸⁾

CHAPTER II.

WHO MAY BE INSURED.

INSURANCE is not distinguished from any other contract, in respect to the ability of the parties to contract. Any one capable of binding himself by a contract, may be an insurer; and in general any person having an insurable interest, may become an assured.^(a)

No contract with the subjects of a hostile state, or on their behalf, is binding. During a war all trading with the public enemy is interdicted, and he is regarded as an outlaw.⁽¹⁾ 'No principal of national or municipal law,' says Mr. Justice Story, 'is better settled, than that all contracts with an alien enemy, made during a war, are utterly void.'⁽²⁾

It was formerly held that the contract of insurance might be made in favour of an alien enemy, and enforced in time of war, though it was not the practice to make the policy in his name.^(b)

(1) *The Hoop*,
1 Rob. 196.

(2) *Cargo of the Emulous*,
1 Gal. 571.
See also *Potts v. Bell*, 8. T. R. 548.

(a) In England, the London and the Royal Exchange Assurance Companies, have certain privileges, but these privileges have been much complained of, and it appears by a report of a committee of the House of Commons in 1810, that they have been, as monopolies generally are, injurious to the interests of trade.

(b) *Planché v. Fletcher*, Doug. 251; *Gist v. Mason*, 1 T. R. 84; *Lavabre v. Wilson*, Doug. 284. Contracts for the ransom of captured property were another exception to the general rule, and after the war of 1756, between England and France, and during that of 1778, Frenchmen maintained actions in the English courts on ransom bills. *Ricord v. Bettenham*, 3 Bur. 1734; *Cornu v. Blackburne*, Doug. 641. In the former of these actions, Sir William Blackstone is said to have been informed by several eminent jurists of the continent, that a similar action would have been maintained in their courts. Sir William Scott says, that 'even in cases of ransoms, the enemy was not permitted to sue in his own proper person for the payment of the ransom bill. The action was brought by the hostage for the recovery of his freedom.' *The Hoop*, 1 Rob. 201. But the above actions brought by Ricord and Cornu, were both brought in the names of the aliens. Lord Kenyon says, *Ricord v. Bettenham* 'was not brought until peace was restored, which gets rid of the objection' to the plaintiff as an alien enemy. *Brandon v. Nesbitt*, 6 T. R. 22. But the action of *Cornu v. Blackburne* was brought during the continuance of the war. In *Henkle v. Roy*, Ex. Ass. Co. 1 Vez. 317, determined in 1749, the Chancellor says, 'no determination has been, that insurance of enemy's ships during war is unlawful,' though trade in general, he says, is so. The French boasted that the English had during the war ending in 1763, indemnified them by insurance for what they had lost by captures. 2 Val. 32. h. t. a. 2. But perhaps the French had again indemnified the English insurers by premiums.

(1) *Weskett*
tit. *Enemy*.

The arguments in favour of keeping up this commercial intercourse with the enemy, were drawn, not from any legal principles, but wholly from a supposed interest, the calculation being, that the insurers would receive in premiums more than they would pay in losses.(1) Lord Mansfield favoured these insurances upon this ground, though Mr. Justice Buller says, he never could get him to reason upon their legality.(a)

(2) 21 Geo.
II. c. 2;
Geo. III. c.
27.

The same arguments might be used in favour of almost every species of commercial intercourse, where it might be supposed that the subjects of the government permitting it, would profit more than those of the enemy, and so the enemy be comparatively weakened. Against the expediency of insuring enemy's property, it was urged, that it gave to one class of citizens an interest on the side of the enemy. The British parliament has, by two several statutes, prohibited such insurances during the respective wars pending at the time.(2)

But the courts have decided that these insurances were illegal, independently of those statutes,(b) and it is well settled law that an underwriter cannot bind himself to indemnify an alien for a hostile capture by a ship acting under a commission from the underwriter's own government; and that he cannot bind himself to indemnify an alien enemy against any loss, or contract with him for insurance, or for any other purpose. And it is indifferent whose name appears in the policy, for if the interest proposed to be protected, is that of an enemy, the contract is void.(3)

(3) *Brandon*
v. *Nesbitt*, 6
T. R. 23.

An Alien enemy may insure privileged trade.

(4) *Wells* v.
Williams, 1
Salk. 45. S. C.
1 Ld. Raym.
282.

(5) *Society*,
&c. v. *Wheeler*, 2 Gal. 105

But if an alien enemy have any privilege of trading or holding property, he will have the usual incidents to such privilege, and among others, the right of protecting his property by insurance. It has been held that an alien enemy residing, under a safe conduct, in a country at war with his own, may bring an action in the courts of that country,(4) and it seems to be a consequence of this rule, that he may make valid contracts. If he have the privilege of holding lands he may, during war, maintain an action for the possession or other rights growing out of his title,(5) from which it may be inferred, that if he has the privilege of holding a house, he may have it insured. If he has a license to carry on a particular trade, he ceases to have a hostile character, as respects such trade, and it may be insured.

(a) *Bell*. v. *Gilson*, 1 B. & P. 354. It is somewhere said, that when Frenchmen were insured in England, during a war between the two countries, some French merchants would have themselves fully insured at home, and to three or four times the amount of their interest in England, and then send their vessels out to be captured.

(b) *Furtado* v. *Rodgers*, 3 B. & P. 191, where Lord Alvanley gives the opinion of the court very elaborately, which has been confirmed in *Kellner* v. *Le Mesurier*, 4 East, 396; *Gamba* v. *Le Mesurier*, 4 East, 407; *Brandon* v. *Curling*, 4 East, 410; *M'Connell* v. *Hector*, 3 B. & P. 113; *De Luneville* v. *Phillips*, 2 N. R. 97. And see 2 Val. 32. h. t. a. 2.; 1 Emer. 128. c. 4. s. 9.

ed; (a) and the other rights incident to the trade, such as that of stoppage *in transitu*, will be enjoyed by the party licensed. (1)

In regard to the circumstances which constitute national character 'it is clear, by the law of nations, that the national character of a person, for commercial purposes, depends upon his domicil.' (2) 'No position is more established than this, that if a person goes into another country and engages in trade, and resides there, he is, by the law of nations, to be considered as a merchant of that country.' (3)

'What is a residence, or domicil, is in itself a question of considerable difficulty, depending on a great variety of circumstances, that cannot be enumerated with precision. The active spirit of commercial enterprise, increases this difficulty, by increasing the variety of local situations, in which the same individual is to be found at no great distance of time.' (4)

The circumstances which determine the domicil of a person are, in general, the purpose for which he goes to a country, the time he has remained, or proposes to remain there, the extent of his business in comparison with its extent in other places, and his forming domestic ties and an establishment, or retaining them in the place of his former residence.

Sir William Scott thinks that 'time is the grand ingredient in constituting domicil. In most cases it is unavoidably conclusive. It is not unfrequently said, that if a person comes only for a special purpose, *that* shall not fix a domicil. This is not to be taken in an unqualified latitude, and without some respect had to the time which such a purpose may or shall occupy, for if the purpose be of a nature that *may probably*, or *does actually*, detain the person for a great length of time, I cannot but think that a general residence might grow upon the special purpose. A special purpose may lead a man to a country, where it shall detain him the whole of his life. A man comes here to follow a law-suit. It may happen that it may last as long as himself. Some suits are famous in our judicial history for having even outlived generations of suitors. I cannot but think that against such a long residence the plea of an original special purpose could not be averred; it must be inferred in such a case, that other purposes forced themselves upon him, and mixed themselves with his original design, and impressed upon him the character of the country where he resided. Suppose a man comes into a belligerent country at or before the beginning of a war; it is certainly reasonable not to bind him too soon to an acquired character, and to allow him a fair time to disengage himself; but if he continues to reside during a good part of the war, contribut-

(1) *Fenton v. Pearson*, 15 East, 419.

National character depends upon domicil.

(2) 7 Cranch, 542.

(3) *The Indian Chief*, 3 Rob. 18.

(4) *The Harmony*, 2 Rob. 322.

What constitutes domicil.

(a) *Flagedorn v. Reid*, 1 M. & S. 567, &c. In *Kensington v. Inglis*, 8 East, 273, Lord Ellenborough says, the license cannot remove the personal disability of the trader to bring a suit in his own name, yet it purges the trust, so that his agent in whose name the policy is made, may bring a suit upon it for his benefit. But in *Usparicha v. Noble*, 13 East, 332, the same judge says, the license may exempt any person, as well as any branch of commerce, from the disabilities and forfeitures arising out of a state of war.

ing by payment of taxes and other means, to the strength of that country, I am of opinion, that he could not plead his special purpose with any effect, against the rights of hostility. If he could, there would be no sufficient guard against the fraud and abuses of masked, pretended, original and sole purposes of a long continued residence. There is a time which will estop such a plea; no rule can fix the time *a priori*, but such a time there must be.'

Intention of
remaining.

'In proof of the efficacy of mere time, it is not impertinent to remark, that the same quantity of business, which would not fix a domicile in a certain space of time, would nevertheless have that effect, if distributed over a larger space of time. Suppose an American comes to Europe, with six temporary cargoes, of which he had the present care and management, meaning to return to America immediately; they would form a different case from that of the same American, coming with one cargo, and fixing himself, to receive five remaining cargoes, one each year successively. It is to be taken in the compound ratio of the time and the occupation, with a great preponderance on the article of time; be the occupation what it may, it cannot happen, but with few exceptions, that mere length of time shall not constitute a domicile.'⁽¹⁾

(1) The Harmony, 2 Rob. 322.

'The question whether the person to be affected by the right of domicile has sufficiently made known his intention of fixing himself permanently in a foreign country, must depend upon all the circumstances of the case. If he had made no express declaration on the subject, and his secret intention is to be discovered, his acts must be attended to, as affording the most satisfactory evidence of his intention. In questions on this subject, the chief point to be considered is *animus manendi*. If it appears that the intention of removing was to make a permanent settlement, or for an indefinite time, the right of domicile is acquired by a residence of even a few days.'⁽²⁾ 'The shortest residence, if with the design of a permanent settlement, stamps the party with the national character. The question results in an inquiry into the intention and conduct of the party.'⁽³⁾

(2) The Venus, 8 Cranch, 279.

(3) The Ann Green, 1 Gal. 274.

A Scotchman coming to the United States in 1795, took up his residence at New York, and became a naturalized citizen, and in 1807 became a member of a commercial house there, and in 1808 went to Jamaica to collect debts due to his house, whither he went again in 1810 and staid about a year, and again in 1811 for the same purpose, and remained until after the declaration of war by the United States against Great Britain in 1812. Though he had resided a considerable portion of his time at Jamaica during the four years preceding the war, and was there when war was declared, it was held that his native national character had not reverted, so as to supersede that acquired by residence in the United States, since he was absent rather for a temporary purpose, than with the intention of establishing himself abroad; his business continued to be conducted at New York, and it was understood there, that he proposed to return.'⁽⁴⁾

(4) *Ib.*

Lord Ellenborough says, that if a man be entrapped, and detained in a foreign country, this will not confer upon him its national character ;(1) and Lord Thurlow,(2) that though ' the actual place where a man is, is *prima facie* to a great many purposes his domicil, yet you encounter that, if you show it is either constrained, or, from the necessity of his affairs, transitory ; that he is a sojourner.'

Compulsory residence.

(1) Bromley v. Hesselstine, 1 Camp. 75.

(2) Bempde v. Johnstone, 3 Ves. 201.

One belonging to the enemy's country cannot be insured upon his interest in the trade of a house established in a neutral country.(3)

(3) The Venus, 8 Cranch, 299. Citizens abroad at the declaration of war.

Some American merchants residing in England, before hearing of the declaration of war by the United States against Great Britain in 1812, and while they had no particular expectation of it, shipped cargoes to the United States, which were captured by American cruisers. Some of these merchants were native British subjects, who had formerly emigrated to the United States, and become naturalized citizens. ' It was contended by the captors, that as these claimants had gained a domicil in Great Britain, and continued to enjoy it up to the time when war was declared, and when these captures were made, they must be considered as British subjects in reference to this property, and, consequently, that it might be legally seized as prize of war, in like manner as if it had belonged to real British subjects. But if not so, it was then insisted, that these claimants having, after their naturalization in the United States, returned to Great Britain, the country of their birth, and there resettled themselves, they became reintegrated British subjects, and ought to be considered in the same light as if they had never emigrated.'

' On the other side it was argued that American citizens settled in the country of the enemy, were entitled to a reasonable time to elect, after they knew of the war, to remain there, or to return to the United States, and that until such election was, *bona fide*, made, the courts of this country were bound to consider them as American citizens, and their property, shipped before they had an opportunity to make this election, as being protected against American capture.'(4)

(4) The Venus, 8 Cranch, 277.

A majority of the judges were of opinion ' that the doctrine, that a native, or naturalized subject of one country, who is surprised in the country where he was domiciled, by a declaration of war, ought to have time to make his election to continue there, or to remove to the country to which he owes a permanent allegiance ; and that until such an election is made, his property ought to be protected from capture by the cruisers of the latter, is as unfounded in reason and justice, as it clearly is in law. The doctrine would apply to cases where the party claiming the benefit of it may gain all, and can lose nothing. If he, after the capture, should find it his interest to remain where he is domiciled, his property embarked before his election was made, is safe, and if he finds it best to return, it is safe. This doctrine, producing such contradictory consequences, is not only unsupported by any authority, but it would violate principles long and

well established. The character of the property during war cannot be changed *in transitu*, by any act of the party.'

But Chief Justice Marshall dissented; he said, 'I think I cannot be mistaken when I say that, in all the views taken of this subject by the most approved writers on the law of nations, the citizen of one country residing in another, is not considered as incorporated in that other, but is still considered as belonging to that society of which he was originally a member. And if war break out between ~~the two~~ nations, he is to be permitted, and is expected, to return to his own. If it be the real intention of the citizen permanently to change his national character, if it be his choice to remain in the country of the enemy during war, there can be no harshness—no injustice—in treating him as an enemy. But if, while prosecuting his business in a foreign country, he contemplates a return to his own; if, in the prosecution of that business, he is promoting, rather than counteracting, the interests and policy of the country of which he is a member, it would seem to me to be pressing the principle too far, and to be drawing conclusions which the premises will not warrant, to infer, conclusively, an intention to continue in a country which has become hostile, from a residence, and trading in that country while it was friendly.

'The character of his property shipped before a knowledge of the war, ought not to be decided absolutely by his residence at the time of the shipment or capture, but ought to depend on his continuing to reside and trade in the enemy's country, or on his taking prompt measures for returning to his own.'

Chief Justice Marshall thought that the acts of the party on his hearing of a declaration of war, are proper and safe evidence of what were his previous intentions; the other judges thought that such evidence could not safely be admitted. (1)(a)

(1) *The Venus*, 8 Cranch, 277.

(a) The consequence apprehended by the other judges from the adoption of Chief Justice Marshall's opinion, namely, that the private property of some subject of the enemy might escape condemnation, does not seem to be worthy of being greatly deprecated, whereas, the opposite consequence,—the confiscation, by the government, of the property of its own subjects or neutral foreigners, without any fault on their part—is a grievous and intolerable thing. It seems therefore to be a case in which the leaning of the court, if it may be supposed that any case admits of such a leaning, is more safe, if in favour of the claimant.

Mr. Justice Story says, 1. Gal. 617, 'that the interest of friends may sometimes be involved in our vengeance upon enemies is a matter impossible to avoid;' which is a reason for guarding, as much as possible, against a consequence so unjust and so much to be regretted.

In the case of the *Beraon*, 1 Rob. 102. Sir William Scott says, 'the presumption arising from a man's residence is, that he is there *animo manendi*; it lies on him to explain it.' See also the case of the *Diana*, 5 Rob. 60; and of the *President*, 5 Rob. 277, in which latter it is said an intention accompanied by some overt act, may rebut the presumption from residence; but whether the act must precede, or may be subsequent to the declaration of war, is not said; and also

Whatever facility may be given to the acquisition of a commercial domicile, it has never been contended that a merchant, having a fixed residence, and carrying on business at the place of his birth, acquires a foreign commercial character by occasional visits to a foreign country.(1)(a) But where a foreigner came to New York for the purpose of recovering his health, and continued there after he had recovered it, and engaged in trade more or less, and it did not appear when he intended to return to his own country, he was held to have acquired a domicile.(2)

In the case of a native American who had married in England, where his family had resided for three years, and he had been master of a vessel trading between England and the United States, during a part of that time, but for the last year had not been out of England, though he intended to remove to America with his family; he was considered by Lord Kenyon to be an Englishman as to his national character, for commercial purposes.(3)(b)

A resident in a colony or factory acquires the national character of the country to which it belongs.(4) But if the government treat the inhabitants of a third country, in the occupation of the enemy, as neutral, insurance may be made in their behalf, as was done in Great Britain, in regard to the inhabitants of Hamburg in 1810, when it was occupied by the French.(5)

'A man may have mercantile concerns in two countries, and if he acts as a merchant of both, he must be liable to be considered as a subject of both, with respect to the transactions originating respectively in those countries.'(6) So 'a man may have two domicils for some purposes.'(7)

the Ocean, 5 Rob. 90, in which the party, an Englishman, on the appearance of hostilities, being then in France, had taken measures to return to England, but was detained afterwards by the French government, his property was restored to him; and the *Citto*, 3 Rob. 38; in which the property of a British subject, who resided in Holland after the declaration of war, for the purpose, as he alleged, of collecting his debts, was condemned by Sir W. Scott. Chief Justice Marshall, however, says of Sir William Scott's decisions, 'it is impossible to consider them attentively, without perceiving that his mind leans strongly in favour of the captors.' 8 Cranch, 299. See also the case of *Curtissos*, cited, 3 Rob. 21; and the *Frances*, 8 Cranch, 335.

(a) The subject of domicile is elaborately treated of and the cases collected, in the appendix to the second volume of Wheaton's reports.

(b) In *Somerville v. Somerville*, 5 Ves. 787, the Master of the Rolls says, in regard to the distribution of personal estate, 'the domicile of origin is to prevail until a party has not only acquired another, but has manifested and carried into execution, an intention of abandoning his former domicile, and taking another as his sole domicile;' i. e. other things being equal, the domicile of origin shall prevail. See also *The Friendschaft*, 3 Wheat. 51, in which an English merchant, having an establishment at Lisbon, though he returned to England for a temporary purpose, is held to retain the Portuguese national character.

Temporary residence.

(1) *The Nereide*, 9 Cranch, 388.

(2) *Elbers v. Un. Ins. Co.* 16 Johns. 128.

(3) *Tabbs v. Bendelack*, 4 Esp. 108.

A resident in a colony or factory, or, in a country occupied by the enemy.

(4) *The Indian Chief*, 3 Rob. 22; *The Boedes Lust*, 5 Rob. 233.

(5) *Hagedorn v. Bell*, 1 M. & S. 450. See also *Blackburne v. Thompson*, 6 Camp. 61. 15 East, 81.

(6) *The Jonge Klassina*, 5 Rob. 302.

(7) *Somerville v. Somerville*, 5 Ves. 786. See also *The Ann*, 1 Dod. 221.

- (1) *Hope Ins. Co. v. Boardman*, 5 Cranch, 57; *Bank of U. S. v. Deveaux*, 5 Cranch, 62; *Society, &c. v. Wheeler*, 2 Gal. 105.
- (2) *Duguet v. Rhinelanders*, 1 Johns. Cas. 360; *Jackson v. New York Ins. Co.* 2 Johns. Cas. 191; *The Dos Hermanos*, 2 Wheat. 78.
- (3) *1 Caines' Cas.* xxv. 2 Johns. Cas. 476.
- (4) *The Indian Chief*, 3 Rob. 12; *Arnold v. Unit. Ins. Co.* 1 Johns. Cas. 363.
- (5) *The Endraught*, 1 Rob. 124; *The Embden*, 1 Rob. 17; *The Frederick*, 5 Rob. 9; *The Ann*, 1 Dod. 221; *The Vriendschap*, 4 Rob. 166; *The Indian Chief*, 3 Rob. 12.
- (6) *La Virginie*, 5 Rob. 98; *The Indiana*, 3 Rob. 12; *The St. Lawrence*, 1 Gal. 467.
- (7) *The Frances and Cargo*, 1 Gal. 616; *The Indian Chief*, 3 Rob. 21; *The Ann Green*, 1 Gal. 274.
- (8) *The St. Lawrence*, 1 Gal. 467.

The national character of a corporation depends upon that of its members.(1)

It has been held in the Supreme Court of the United States and that of New York, that a subject of a belligerent country, who emigrated to a neutral country, during war, did not acquire the national character of the neutral country, by residence, while the war continued.(2) But the Supreme Court of Errors in New York, decided that the emigrant, in such case, if he emigrated *bona fide*, and not merely to mask commercial enterprises under a neutral flag, would acquire the national character of the country to which he emigrated, in the same manner as if he had come from a friendly country.(3)

The national character of a consul is not affected by his office, but is determined like that of other persons, by residence, and the various other circumstances that constitute national character.(4)

Mariners are considered to be of the nation to which the ships belong, on board of which they are employed.(5)

The native character easily reverts, and it requires fewer circumstances to constitute domicile in the case of a native, than to impress the national character on one who is originally of another country.(6) Accordingly, if the party puts himself *in itinere* to return to his native country, and is in pursuit of his native character, he is deemed already to have resumed it;(7) provided he has been engaged in a trade completely lawful in his native character.(8)

CHAPTER III.

INSURABLE INTEREST.

Section 1. *What interest is sufficient.*

It is essential to every contract of insurance, that the assured should have an interest at risk. If he have no interest, or if his interest be not *at risk*, he can be liable to no loss, and accordingly there is nothing against which the insurer can agree to indemnify him.

It is not requisite, however, that the thing to which the insurance relates, or the interest of the assured, should be such as to have what is properly called a value, or price, or be capable of being assigned. One may insure the life or liberty of a free-man, though he cannot be said to have any particular pecuniary value, nor has the assured any interest in his life or liberty which he can assign. The French Ordinance permits a person interested in the liberty of a mariner or passenger upon a voy-

age, to insure him against capture.(1) And it permits the relatives of a person ransomed from slavery among the Barbary corsairs, and also the person who has paid his ransom, to insure his safe return home.(2) The Ordinance plainly recognises an insurable interest in these cases.

A person being insured against the risk of being drafted to serve in the militia, no doubt was suggested that one liable to be so drafted had an insurable interest in that event.(3)

But insurance is a contract for pecuniary indemnity; and consequently, though neither the thing concerning which the contract is made, nor the interest of the assured, must necessarily have any specific worth, that can be computed in money, or exchanged, yet the peril or event insured against must be such, that its happening might bring upon the insured a pecuniary loss. It is sufficient that it *might* bring a loss, and by no means necessary that it should certainly have that consequence, were it to happen. A creditor has an insurable interest in the life of his debtor, though it is not certain, that the debtor would pay him, should he live, yet there is some probability, more or less remote, that he would.(4)

It is a general rule that, in order to have an insurable interest in any subject, a person must be liable to a direct and immediate loss by its damage or destruction; it is not enough in general, that he is liable to damage indirectly and incidentally, in consequence of the damage sustained by another.

Policies are frequently made in reference to a future interest. 'It is every day's practice to insure goods before they are bought,'(5) yet if one insures them on his own account, the property must pass to him before a loss happens, otherwise he can recover nothing under the policy. Goods ordered by Messrs. Horton and Cummings of Philadelphia, were shipped in England, and consigned to the agents of the shippers in Philadelphia, with orders to deliver them to Messrs. Horton and Cummings, on the condition of their being first paid for. Horton and Cummings insured the goods, which were lost on the voyage. It was decided that they could not recover any thing for the loss, for they had no interest in the goods, the property in which was to pass to them, only on their previously paying the price.(6) But in the case of a purchase on credit, though the vender has the right of stopping the goods *in transitu*, upon the consignee's becoming insolvent, and thus defeating the purchase, this right does not prevent the consignee from having an insurable interest.(7)

It is plain that the interest of the assured ought to continue and to be subsisting at the time of the loss, in order to give him any claim against his underwriters for indemnity.(8) It has been held, however, that the sale and conveyance in fee of a house insured, which the purchaser at the same time mortgaged back to the vender, did not divest the assured of his interest under the policy.(9)

Any act by which the property is forfeited, will take away the insurable interest of the owner, as effectually as a sale. By

(1) h. t. a. 9.

(2) a. 11. 1
Emer. 203, c.
8. s. 3.

(3) Duffell v.
Wilson, 1
Camp. 401.
Astley v. Ray,
2 Taunt. 214.

(4) See Mr.
Justice Lawrence's opinion in *Luce-
na v. Craufurd*, 2 N. R.
301, as to in-
surable inter-
est generally.
(5) Rhind v.
Wilkinson, 2
Taunt. 237.

(6) *Warder v.
Horton*, 4
Bin. 529.
See *The Auro-
ra*, 4 Rob.
218; *The Jo-
sephine*, 4
Rob. 25, and
The Atlas, 3
Rob. 299.

(7) *Lucena v.
Craufurd*, 3
B. & P. 75, 2
N. R. 269.

(8) *Carroll &
al. v. Bost.*
Mar. Ins. Co.
8 Mass. Rep.
515.

(9) *Stetson v.
Mass. Mut.*
F. Ins. Co. 4
Mass. Rep.
330.

(1) *Laws of U. S. v. 4 c. 195. [xci.]*

(2) *Fontaine v. Phœn. Ins. Co. 1 Johns. 293.*

(3) *United States v. Grundy, 3 Cranch, 337.*

(4) *Lockyer v. Offley, 1 T. R. 260.*

(5) *Lucena v. Craufurd, 2 N. R. 319. See also — v. Sands, 10 Mod. 79, where possession by captors four years without condemnation is held not to change the property.*
(6) *Robinson's Col. Mar. 32. n.*

an act of Congress passed in March 1809, the importation of goods from Great Britain, or its dependencies, was prohibited, and it was provided that if any articles, the importation of which was prohibited by that act, should be put on board of any vessel, with intention to import the same into the United States, such vessel should be forfeited.(1) After the act went into operation, a part of a cargo of molasses was taken on board of the schooner *Phoenix*, at Martinique, then in possession of the British, with the intention of importing it into the United States, when the vessel was driven ashore and lost. Under a policy upon the vessel, it was objected, that the owners had lost their insurable interest by her being forfeited to the United States. Yates, J. giving the opinion of the court, said, 'the act affords but one remedy, and that is the forfeiture of the vessel, so that the seizure is not necessary to change the property; the owner loses his right in it immediately after the commission of the act producing the forfeiture.'(2) But if an act be done by which the vessel, or its value, is forfeited, the owner does not lose his insurable interest in the vessel, until it is seized for the forfeiture, since the government may claim the value of the vessel, instead of the vessel itself.(3) It has been held in England, that 'if a vessel is seized *pro justa causa*, the property is immediately vested in the crown.'(a) By which it seems to be implied, that the owner does not lose his interest until the seizure is made. Mr. Justice Willes, giving the opinion of the court, says, 'the actual property is not altered till after the seizure.'(4)

In regard to the change of interest in an enemy's ship, Lord Eldon says, 'if a ship be taken by hostile force, the title to that ship as against foreigners cannot be changed by any act of local legislation, but the ship must be condemned in a court proceeding according to the law of nations, on rules binding, not only on subjects of the country where the court is held, but on foreigners who are not so.'(5)

It has been a practice of the French government since 1793, to grant commissions to its consuls in foreign countries to hold prize courts.(6) It has been held in England and the United States, that these courts are not legally constituted, and that their proceedings have no validity. A question has been thereupon made, whether the title to a ship, acquired by a condemnation and sale, under a decree of one of these tribunals, gave to the purchaser an insurable interest. A Dutch vessel was condemned at Bergen, in Norway, by the French consul there, and purchased under that decree by a Danish subject, who sold her to the assured. A loss happening, his interest was disputed. Lord Kenyon said to the jury, that 'the sentence of a

(a) *Pipon v. Cope, 1 Camp. 434. See also Wilkins v. Despard, 5 T. R. 112, where Thomas & al. v. Withers per Gould J. and Hennel v. Perry, per Lord Mansfield, are cited to the same point; and the U. S. v. The Anthony Mangin, 3 Cranch, 356. n. S. C. 7 Peters' Adm. Rep. 452, per Winchester J. an elaborate case.*

French court, in a country out of the jurisdiction of France, had been wisely held not to change the property; but when it had been acquiesced in, in that country, it might make a difference.⁽¹⁾ It does not appear that the Danish government acquiesced in the decrees of this court, otherwise than by not interfering to stop its proceedings. This is a decree of acquiescence yielded in every country where such a court is held.

(1) *Smith v. Surridge*, 4 Esp. 25.

Section 2. The legality of the Interest.

In certain cases the law does not permit insurance, though the interest may be in itself sufficient. The English laws prohibit insurance upon marriages, births, and christenings; (2) the price of public stocks; (3) and the slave trade. (4) The codes of other European states prohibit insurance on certain subjects. Such prohibitions have not been found necessary in the United States. But the courts of no country can lend their aid to enforce the execution of a contract, which involves a violation of the laws that those courts were constituted to administer. It is a universal principle, that if it be the design of the policy to protect property implicated in an illegal trade, or applied to an illegal use, or which it is not lawful for the assured to hold, the insurance is void. The owner of property so held or employed, has no legal insurable interest in it. And upon the same principle, though a person have an interest in property, or an event, which the law will recognise, and employ his interest in a way that the law will justify, still if an insurance of his interest be contrary to the spirit, policy, and general principles of the laws, he will cease to have a legal insurable interest.

(2) 6 Geo. I. c. 18.
(3) 7 Geo. II. c. 18. s. 4.
(4) 47 Geo. III. c. 36.

The interest must be legal.

A war suspends commercial intercourse with the subjects of the hostile country, and renders it unlawful to buy of them, or sell to them, or contract with them; the goods, and ships, and any other subjects of insurance, embarked in such intercourse, or destined to it, or to be derived from it, become affected by the prohibition. Property or interests so employed, or so situated, cannot lawfully be protected by insurance. This incapacity of the subject, is different from the disability of an alien enemy to be insured, though it depends upon the same principle, namely, the unlawfulness of commercial intercourse with the enemy; one being the personal disability of an alien enemy, the other the effect upon property, or an interest, of being employed in contravention of law, or involved in a prohibited intercourse.

Property employed in trade with the public enemy.

When, however, Lord Mansfield and other English judges favoured insurance on behalf of public enemies, they could not but extend the indulgence to trade carried on with them. Accordingly, in a case of a policy on goods bought in Holland after the commencement of war, Mr. Justice Buller said, the 'underwriter had no right to go into the state of the property, previous to the time when he insured,' and could not object that it had been

- (1) *Bell v. Gilson*, 1 B. & P. 345.
- (2) *Gist v. Mason*, 1 T. R. 84.
- (3) Cases cited, 1 Rob. 202, &c. in the case of the *Hoop*.
- (4) The *Hoop*, 1 Rob. 196. See also the *Odin*, 1 Rob. 248.
- (5) *Potts v. Bell*, 8 T. R. 548.
- (6) The *Julia*, 8 Cranch, 181. Property in enemy's country at the breaking out of war.
- (7) Cases cited, 1 Rob. 202, &c. in the case of the *Hoop*.
- (8) The *Joseph*, 1 Gal. 545.
- (9) The *Rapid*, 8 Cranch, 155. See also the *Alexander*, 8 Cranch, 169.
- (10) The *Frances*, 8 Cranch, 335.
- purchased of the enemy.(1) Mr. Justice Heath concurred, but Mr. Justice Rooke was inclined to dissent. Lord Mansfield said,(2) that though trade with the enemy is prohibited by the maritime law, he knew of but two cases to that effect at common law, seeming to intimate a doubt whether it was in fact prohibited at common law. Numerous decisions had been made in the admiralty, and in the House of Lords, that trade with the enemy was unlawful.(3) Insurance on such a trade would accordingly have been void. This point was considered particularly by Sir William Scott in 1799, in the case of goods imported from Holland by Englishmen, while that country was at war with England, and he held that the goods were subject to seizure and forfeiture.(4) And soon afterwards Lord Kenyon and the other judges of the King's Bench, acquiesced in this opinion, and held that an insurance of goods so imported was void.(5) The unlawfulness of trade with the enemy has been a subject of frequent consideration in the courts of the United States. Mr. Justice Story, says, 'I lay it down as a fundamental proposition, that strictly speaking, in war, all intercourse between the subjects and citizens of the belligerent countries is illegal, unless sanctioned by the authority of the government, or in the exercise of the rights of humanity.'(6)
- The prohibition of intercourse consequent upon a state of war is so general and complete, that it has been held to extend to a citizen's property remaining in the hostile country at the breaking out of the war.(7) 'His property cannot be removed with safety from the enemy's country, unless under the sanction of his own government, because the law would never deem that a reasonable mode of conveying property, which involved in it a trade with the public enemy.'(8)
- An American citizen had purchased goods in England before the war, and deposited them on Indian Island, belonging to the British, and near the boundary of the United States, and after the breaking out of the war, a vessel was sent from Boston to fetch the goods. Both vessel and cargo were forfeited, and consequently the owners of neither could have protected their interest by insurance.(9)
- But there are not wanting authorities to show that citizens having property abroad at the breaking out of a war, may have it brought home, without thereby exposing it to forfeiture, and where the bringing home of the property is lawful the proprietor may insure it. The ship *Frances* sailed from Greenock in Scotland, on the 19th of July 1812, being the day after the declaration of war by the United States against Great Britain, and was captured by an American privateer. Claims were put in for different parts of the cargo by sundry American citizens, and the only question made by the court, was, whether they were actually and *bona fide* owners of the property.(10)
- In another case a ship sailed from Liverpool to the United States, 'a few days after the declaration of war was known in Great Britain,' and was captured on her voyage by a private

armed American vessel. Part of the cargo was claimed by M'Kean and Woodland, American citizens, and their claim was allowed, the only question suggested by the court, being, whether the property had vested in them when the goods were purchased by their agent in England before the declaration of war.(1) Sir William Scott held that goods ordered before the war, might be imported from the enemy country after the declaration of hostilities, if there had been no opportunity of countermanding the order.(2)

It appears then that a declaration of war does not necessarily, and without distinction, fix a hostile character upon all property, at that time in the country of the enemy. But the rules in respect to the time within which property so situated may be imported, and the manner in which the importation must be conducted, or the circumstances which will justify it, do not seem to be very definitely and satisfactorily laid down. Where the property has been condemned, there have generally, if not invariably, been some circumstances to give it a hostile character—there has been great delay, or some intermediate trade, or intercourse, or community of interest with the enemy, or such an opportunity for these as could not safely be indulged.

It has been held that a party, whose property has been seized by the enemy, or by persons with whom trade is interdicted, may lawfully take such goods as are given him in exchange. Trade with France and its dependencies being interdicted, a ship was driven by stress of weather, into port St. François in St. Domingo, a French port, where a part of the cargo was seized by the public officers, who forbade the exportation of the rest, but gave the captain leave to exchange it for the produce of the island. It was held that the goods obtained in exchange might be insured.(3) And Chief Justice Marshall said, in delivering the opinion of the court, that even if an actual and general war had existed between this country and France, 'this would not have been deemed such a traffic with the enemy as would vitiate the policy upon the new cargo.'(4)

The illegality of a part of a cargo has not been held in all cases to infect the remainder. An insurance being made on a cargo, a part of which was liable to condemnation on account of being imported from the enemy's country, the importation of the rest being authorized by a license, the insurance was considered valid in respect to the goods covered by the license.(5) And in the case of insurance on 300 barrels of gunpowder, the exportation of only half of which was licensed, and the law provided that gunpowder exported without license should be forfeited, and also the ship in which it was exported, Gibbs C. J. said, 'The licensed barrels were not forfeited, then the exportation of them was legal, and the insurance thereon is also legal.'(6)

But Lord Ellenborough had said, in the case of a cargo, the exportation of a part of which was prohibited, with the penalty of the forfeiture of the goods and the ship, 'that it had been decided a hundred times, that if a party insure goods altogether

(1) 8 Cranch, 317, *The Mer-rimack*.

(2) *The Juff-row Catharina*, 5 Rob. 141. See also *Saltus v. Unit. Ins. Co.* 15 Johns. 523.

Goods bought of the enemy or at a prohibited port, from necessity.

(3) *Jenks v. Hallett*, 1 Caines, 60. 1 Caines' *Cast. in Err.* 43. (4) *Hallett v. Jenks*, 3 Cranch, 210.

(5) *Pieschell v. Allnutt*, 4 Taunt. 792. See also *Butler v. Allnutt*, 1 Stark. 222.

(6) *Keir v. Andraade* 6 Taunt. 498; *Keir v. Andraade*, 2 Marsh. Rep. 196. See also *The Vriendschap*, 4 Rob. 166.

- (1) *Parkin v. Dick*, 11 East, 802, 2 Camp. 221. in one policy, and some of them are of a nature to make the voyage illegal, the whole contract is illegal and void.'(1) And where a part of the goods belonging to a shipper were contraband, Sir William Scott condemned the whole. He said, 'to escape the contagion of contraband, the innocent articles must be the property of a different person.'(2)
- (2) *The Staadt Embden*, 1 Rob. 31. See *Bynk. Q. J. Pub. l. l. c. 14*, and *The Jonge Tobias*, 1 Rob. 329. Though ships or goods destined to or from an enemy port, cannot, in general, be protected by insurance;(3) yet where a vessel destined to Copenhagen with supplies intended for the fleet under Lord Nelson, left the Nore three days after the time, when, by the articles of capitulation, the British fleet was to leave Copenhagen, under the expectation that some delay might occur to the fleet; the voyage was held to be lawful and the insurance valid, though the vessel was destined to an enemy's port.(4) And a policy upon goods to any port in the Baltic, some of the ports of which were hostile and others friendly, was held to be valid, it not appearing but that the voyage was to a friendly port.(5) But in the case of a policy on a voyage from Boston to the port of discharge in Europe, 'no exception to be taken on account of ports interdicted by the laws of the United States,' some of the European ports being so interdicted, and others not, and the vessel sailed for a French port, which was among those interdicted, it was decided that the assured could not cover his interest, and that the policy was void.(6)
- (3) *The Joseph*, 1 Gal. 845; *the Rapid*, 8 Cranch, 155.
- (4) *Atkinson v. Abbott*, 11 East, 135, 1 Camp. 535.
- (5) *Muller v. Thompson*, 2 Camp. 610; *Wright v. Welbie*, *Jeremy's Index*, 1819, p. 74.
- (6) *Russell v. Degrand*, 15 Mass. Rep. 35. Sir W. Scott says, 'there must be an act of trading to the enemy country, as well as an intention. No case has been produced in which the mere intention to trade to an enemy's country has enured to condemnation.' And though the voyage was towards a colony supposed by the party to belong to the enemy, but which had been captured by his own nation before the arrival of the ship, it was held not to be a trading to the enemy country.(7) 'Where the country is known to be hostile,' says the same judge, 'a commencement of a voyage towards that country may be a sufficient act of illegality, but where the voyage is undertaken without that knowledge, the subsequent event of hostility will have no such effect.'(8) The circumstance that the goods destined to the enemy are to go first to a neutral port, will not make the adventure lawful. During a war between Great Britain and Holland, it was not permitted to a British merchant to send goods to Embden, then a neutral port, with the view of sending them forward, *on his own account*, to a Dutch port.(9)
- (7) *The Abby*, 5 Rob. 251.
- (8) *The Abby*, 5 Rob. 254.
- (9) *The Jonge Pieter*, 4 Rob. 79. Though the troops of the country to which the assured belongs, have possession of an enemy's port, it is not lawful to make a voyage thither without the sanction of his government, and insurance on ship or goods for such a voyage is ineffectual.(10) But, where a country is in possession of the troops of the enemy, but continues to be under the administration of its own government, the inhabitants have been considered as neutrals in some cases.(11) In general, however, 'though acquisitions made during war are not considered as permanent until confirmed by treaty, yet to every commercial and belligerent purpose they are considered as part of the domain of the conqueror, so long as he retains the possession and government of them.'(12)
- (10) *Johnston v. Sutton*, Doug. 254.
- (11) *Hagedorn v. Bell*, 1 M. & S. 450.
- (12) *Thirty Hogsheads of Sugar v. Boyle*, 9 Cr. 191.

Yet in the case of goods shipped for Messina, a friendly port, but consigned to the subject of a neutral nation resident at Leghorn, at that time occupied by the enemy, the trade was held to be lawful and the insurance valid.(1)

A ship is held to have the character of the nation under the flag and pass of which she sails;(2) and consequently is not insurable, if she sails under the flag and pass of the enemy. But the flag does not determine the national character of the cargo.(3)

If property assumes a hostile character by a declaration of war, after the policy is effected, this does not necessarily defeat the insurance, though an alien enemy has a joint interest in the property. Rotch being domicilled in England, was insured there upon his interest in some fishing vessels fitted out in a French port, the other joint owner of the same vessels being a Frenchman. The vessels were detained in the French ports by an embargo laid after the policy was made, which was followed by a declaration of war. The policy was held to be valid, and a loss by the embargo was recovered after the declaration of war.(4) But the interest which a person resident in a neutral country has in a house of trade established in the country of the enemy, has been considered to have the national character of the hostile country.(5)

If property is seized provisionally in contemplation of hostilities, and war is afterwards declared, the declaration will have a retroactive operation in respect to the property so seized, which will be liable to confiscation in the same manner as if the declaration had preceded the seizure.(6)

As the personal disability of an alien enemy to make contracts, and bring actions, may be removed by his privilege of holding property, or by a safe-conduct, or a license, so a license or privilege granted by sufficient authority, will, in like manner, make it lawful in a subject to carry on trade with the public enemy, and any property employed, or trade conducted, within the privilege, will not be divested of any of the rights which usually belong to it, and it may accordingly be insured.

Whatever man or body of men in a community, has the power of declaring and carrying on war, has, as incident to such power, the right to qualify the declaration, and exempt any persons or property from its operation. This is only continuing or restoring peace, as to some of the subjects of a foreign state or their property, or as to particular descriptions of trade. There is indeed some qualification of hostilities, or something of the character of peace, in all wars between civilized nations, as in the case of cartels, flags of truce, and all the cases that come within the rules of civilized warfare. Licenses and privileges to individuals, or to specific property or kinds of trade, are only an extension of the principles upon which such rules are founded, with this distinction, that the rules of warfare may be the dictates of humanity, whereas licenses and exemptions in respect to trade, generally proceed upon considerations of interest.

(1) Bromley v. Henseltine, 1 Camp. 75.

(2) The Vrouw Elizabeth, 5 Rob. 2; The Vreede Scholtyz, 5 Rob. 5. n.

(3) 5 Rob. 5.

(4) Rotch v. Edie, 6 T. R. 413.

(5) The Friendschaft, 4 Wheat. 105.

(6) The Bodees Lust, 5 Rob. 248; The Hersteller, 1 Rob. 113; Lucena v. Craufurd, 8 T. R. 13, 3 B. & P. 75, 2 N. R. 269.

To divest a trade of its hostile character, the license under which it is conducted must be granted by a sufficient authority. (1) the trade must be conducted by the persons in whose favour the license is granted, (a) within the time for which it is in force, (b) and according to the terms and conditions of the license. (c) It has however been held that a license of trade with an enemy, or a license granted to an enemy to trade, is the subject of a large and liberal construction. (d)

(1) *Vanbarthals v. Halhed*, 1 East, 487; *Vandyck v. Whitmore*, 1 East, 475; *Shifner v. Gordon*, 12 East, 296; *Schroeder v. Vaux*, 15 East, 52.

(2) *The Anna Catharina*, 4 Rob. 118.

If a person not domicilled in the enemy country, make a contract with the hostile government for privileges and the monopoly of a branch of trade, and send an agent into one of its colonies to prosecute business under the contract, the trade has a hostile character and accordingly cannot be insured. (2)

As a license from the merchant's own government will make a trade lawful, which would otherwise have a hostile character, so a license from the enemy will render trade illegal, which would otherwise be entitled to the protection of the law; as in the case of a voyage from the United States to Portugal, with which the United States were at peace, Great Britain being at the same time at war with the United States, where the ship had on board a license from a British admiral, for the purpose

(a) *Fayle v. Bourdillon*, 3 Taunt. 546; *Usparicha v. Noble*, 13 East, 332; *Feise v. Bell*, 4 Taunt. 4; *Morgan v. Aswald*, 3 Taunt. 554; *Klingender v. Bond*, 14 East, 484; *Rawlinson v. Janson*, 12 East, 223; *The Beurse Van Konningsberg*, 2 Rob. 169; *The Jonge Johannes*, 4 Rob. 263; *The Jonge Klassina*, 5 Rob. 297; *The Cousine Marianne*, Edw. Adm. Rep. 346; *Busk v. Bell*, 16 East, 3; *Barlow v. McIntosh*, 12 East, 311.

(b) *Robinson v. Touray*, 1 M. & S. 217; *Feise v. Waters*, 2 Taunt. 248; *Siffkin v. Allnutt*, 1 M. & S. 39; *Freeland v. Walker*, 4 Taunt. 478; *Leevin v. Cormac*, 4 Taunt. 483; *Williams v. Marshall*, 1 Moore, 168; 2 Marsh. R. 92; 6 Taunt. 390; 7 Taunt. 468; *Tullock v. Boyd*, 1 Moore, 174; 7 Taunt. 471; *The Goede Hoop*, Edw. Adm. Rep. 327; *The Carl*, Edw. Adm. Rep. 339; *The Johan Pieter*, Edw. Adm. Rep. 354; *Groning v. Crockat*, 3 Camp. 83.

(c) *Le Cheminant v. Pearson*, & same v. Allnutt, 4 Taunt. 367; *Hagedorn v. Reid*, 1 M. & S. 567; *Hagedorn v. Bazett*, 2 M. & S. 100; *Hullman & al. v. Whitmore*, 3 M. & S. 337; *Anthony v. Moline*, 5 Taunt. 711; *Rucker v. Ansley*, 5 M. & S. 25; *Everth & al. v. Tunno*, 1 B. & A. 142; *Butler v. Allnutt*, 1 Stark, 222; *The Cosmopolite*, 4 Rob. 8; *The Hoffnung*, 2 Rob. 162; *The Jonge Arend*, 5 Rob. 14; *The Juffrow Catharina*, 5 Rob. 141; *The Clio*, 6 Rob. 67; *The Gebroeders*, Edw. Adm. Rep. 95; *The Byfield*, Edw. Adm. Rep. 190; *The Catharina Maria*, Edw. Adm. Rep. 337; *The Wolfarth*, Edw. Adm. Rep. 365; *The Europa*, Edw. Adm. Rep. 341; *The Vrow Cornelia*, Edw. Adm. Rep. 349; *The Jonge Frederick*, Edw. Adm. Rep. 357; *The Cornelia*, Edw. Adm. Rep. 360.

(d) *Defflis v. Parry*, 3 B. & P. 3; *Robinson v. Touray*, 1 M. & S. 217; *Feise v. Waters*, 2 Taunt. 248; *Fayle & al. v. Bourdillon*, 3 Taunt. 546; *Flindt v. Scott*, & same v. Crockatt, 5 Taunt. 674; *Usparicha v. Noble*, 13 East, 332; *Feise v. Bell*, 4 Taunt. 4; *Morgan v. Oswald*, 3 Taunt. 554; *Hagedorn v. Reid*, 1 M. & S. 567; *Kensington v. Inglis*, 8 East, 273; *The Juno*, 2 Rob. 116; *The Planter's Wensch*, 5 Rob. 22; *The Goede Hoop*, Edw. Adm. Rep. 328.

of protecting the property from British capture, the voyage was adjudged to be rendered illegal by the use of the license;(1) and would have been so, even though the license had been procured by the agent, without the owner's knowledge.(2) It was held in Connecticut that such a license obtained through the minister of the neutral country, to whose territories the voyage was intended, did not render the voyage illegal.(3) The Supreme Court of the United States was, however, of opinion that 'the mere sailing under an enemy's license, constituted of itself an act of illegality.'(4) An agreement that a ship should have one of these licenses on board, was held in New York to be illegal and void, and so was a policy, warranting the ship to have such a license.(5)

But a policy on one of these licenses valued at a certain sum, was decided in Massachusetts to be a valid and legal contract.(6) And accordingly the same court held that the having such a license on board of the ship, for the purpose of protecting the cargo against capture, did not render the voyage illegal or make a policy on the cargo void. Parker C. J. said, 'even if the parties had incurred a penalty for possessing the paper, still the voyage was left untainted, and the insurance valid.'(7)

If the voyage be undertaken in violation of the law of nations, or that of the place where the policy is made, the property cannot be insured. A policy on a cargo imported from a foreign port, with which intercourse is prohibited by the law of the place where the insurance is effected is void.(8) If the trade be illegal, it defeats the policy on the ship, as well as that on the cargo.(9) Ships or goods destined in contravention of the monopoly of the British East India or South Sea Company, cannot be effectually insured in England, the privileges of these companies being guaranteed by law.(10) And if any part of the entire voyage or adventure, be in contravention of such monopoly, no insurance will be valid, whether it be for the whole voyage, or the part of it, which, distinct from the other, would have been lawful.(11) But where the outward voyage is distinct from the homeward, and some part of the trade on the outward voyage is in violation of a privilege granted by statute, still the homeward voyage may be insured. A vessel, in her outward voyage, was employed in a trade, by which the privileges of the East India Company were infringed upon, and afterwards went to Canton and took a cargo for Europe, a part of which was purchased with the proceeds of the previous illegal voyage; this was held not to contaminate the interest, and the entire adventure, commencing at Canton, being legal, might well be insured.(a)(12)

If the voyage be in violation of an embargo, laid by the government of the country to which the owner of the property belongs,(b) or in violation of a law, prohibiting the exportation of naval stores, the property cannot be insured.(c) In like manner insurance was defeated by an evasion of the act of parliament

(a) *Bird v. Appleton*, 8 T. R. 562. (b) *Dalmada v. Motteux*, Park. 357. (c) *Parkin v. Dick*, 2 Camp, 221. S. C. 11 East, 502.

(1) *The Julia*, 8 Cranch, 181. See also *the Aurora*, 8 Cranch, 203. (2) *The Hiram*, 1 Wheat. 440. (3) *Bulkley v. Derby Fishing Co.* 1 Conn. Rep. 571. (4) *The Ariadne*, 2 Wheat. 143. See also *Craig v. U. S. Ins. Co.* 1 Peters' Rep. 410. (5) *Ogden v. Barker*, 18 Johns. 87; *Colquhoun v. N. Y. Firem. Ins. Co.* 15 Johns. 352. (6) *Perkins v. N. E. M. Ins. Co.* 12 Mass. Rep. 214. (7) *Hayward v. Blake*, 12 Mass. Rep. 176. (8) *The United States v. The Paul Shearman*, 1 Peters' Rep. 98. (9) *Gray v. Sims & al.* Wharton's Dig. h. t. No. 3. (10) *Camden v. Anderson*, 1 B. & P. 272; *Morck & al. v. Abel*, 3 B. & P. 35; *Chalmer v. Bell*, 3 B. & P. 604; *Dunlop v. Gill*, 1 B. & A. 334. (11) *Wilson v. Marryatt*, 8 T. R. 31. (12) *V. Sewell v. Roy. Ex. Ass. Co.* 4 Taunt. 856.

(1) *Ingham & al. v. Agnew*, 15 East, 517; *Wainhouse v. Cowie*, 4 Taunt. 178; *Darby v. Newton*, 2 Marsh. Rep. 252.

(2) *Gibson v. Service*, 5 Taunt. 433, S. C. 1. Marsh. Rep. 119.

(3) *Camelo v. Britten*, 4 B. & A. 184.

(4) *Everth v. Blackburn*, 2 Stark. 66.

(5) *Laws of U. S. v. 2. c. 146. [I.] s. 2.*

(6) *Duncanson v. McClure*, 4 Dal. 308.

(7) *Marsh v. Robinson*, 4 Esp. 98; *Yallop ex parte*, 15 Ves. 60; *Campbell v. Stein*, 6 Dow. 116; *Houghton ex parte*, 17 Ves. 253; *Camden v. Anderson*, 5 T. R. 709; *Rolleston & al. v. Hibbert & al.* 3 T. R. 406.

(8) *Rolleston & al. v. Smith*, 4 T. R. 161.

(9) *Wendover v. Hogeboom*, 7 Johns. 308.

(10) *Hatch v. Smith & trs.* 5 Mass. Rep. 53; *Pratt & al. v. Phoen. Ins. Co.* 1 Browne, 267, cited Wharton's Dig. 320. h. t. No. 32.
(11) *Laws U. S. v. 2. c. 146. [I.] s. 7.*

requiring vessels to sail with convoy;(1) and also by the forfeiture of a bond given in pursuance of law, the condition of which was, to employ the cargo in trade on the coast of Africa.(2) The English law requires, that, on the exportation of gunpowder, a bond, conditioned to export it to the place proposed, shall be given by the 'merchant exporter.' The bond being given by the manufacturer instead of the exporter, rendered a policy on the gunpowder and other goods void in respect to the other goods, as well as the powder.(3)

The English law prohibits the joint lending of money on bottomry; therefore persons so lending cannot in England insure their interest.(4) The laws of the United States do not permit foreigners to have any interest in American registered vessels;(5) they cannot therefore have any insurable in such vessels.(6) So in England, where the law requires that a register shall be taken out by the owner of the ship, it is held that where the assured had not, at the time of effecting insurance, taken out a register, he had not a legal insurable interest, because he did not hold his interest in conformity to the law.(7) The English law also requires that the register shall be recited in the bill of sale, but a mere clerical mistake in reciting it, such as inserting '1783' instead of '1782,' will not defeat the title of the vendee.(8) But in the United States the law requires no recital of the register in the bill of sale, nor any bill of sale; the interest in a ship as well as in any other chattel, may be transferred by a sale and delivery, without writing.(9) A register is necessary only for the purpose of entitling the ship to the privileges of an American registered vessel, not for that of giving a good title to a purchaser;(10) and to prevent any person resident in a foreign country, except an American consul or a partner of an American house, from participating in the privileges allowed to American ship-owners, a bond is given at the time of taking out a register, to return it for the purpose of having it cancelled on the transfer, to a foreigner, of any interest in the ship.(11)

If a contract involves a contravention of the laws of a foreign state, it is not therefore void. A policy made in New York on linens, nankeens, and cloths, from thence to Jamaica, the importation of which from New York was prohibited by the laws in force at Jamaica, was held to be valid. Lansing, C. J. said, 'this was a voyage undertaken expressly for the purpose of illicit trade in a foreign country. A policy on such a voyage against our own laws would be void, but we are not bound to declare it void, when merely contravening the positive regulations of a foreign state.'(a)

Upon this principle Lord Mansfield, with the concurrence of the other judges, held that a foreigner who sold goods at Dunkirk to an Englishman, knowing that the Englishman intended to smuggle them into England, might recover the price in a British court.(b) Some doubt seems, however, to be thrown upon this

(a) *Gardiner v. Smith*, 1 Johns. Cas. 141, there are many decisions upon this principle. (b) *Holman & al. v. Johnson*, Cowp. 341.

opinion by a subsequent decision. Goods were exported from England upon giving a bond to employ them in trade on the coast of Africa, and the forfeiture of the bond was a breach of the law requiring it. An agreement was made to meet an American vessel, on the coast of Africa, on board of which the goods were to be transhipped. This was held to be a violation of the law by the English vessel; and as the owners of the American vessel participated in this violation of the English law, it was held that neither the American vessel nor the cargo, after being transhipped, could be insured in England.(1)

It is a general rule, however, that a person does not necessarily forfeit the right of insuring his interest, in ship or goods, from the circumstance of their being employed in an interloping trade. It is said that one state does not take notice of the *revenue laws*, or *commercial regulations*, or *municipal laws*, of another. This rule seems to have arisen partly from the circumstance, that some foreign countries, Spain and Portugal in particular, have imposed many commercial restrictions, which their own subjects are in the habit of violating, and it would be an excessive severity in a government to require of its subjects an exact observance of the laws of a foreign country, which are disregarded by the people of that country. Another reason of this rule probably is, that nations, though at peace, have still considered themselves to be rivals and competitors in affairs of trade. Each government, therefore, considers itself at liberty to make any commercial regulation for the purpose of extending its own trade and industry, though at the expense of those of another nation. This seems to give the other nation the right to counteract such regulations, by making others, or by permitting its own citizens to contravene and evade what are, in some sense, intended for hostile measures.

The law of nations is that of every country, and therefore an interest held, or property employed, in violation of that law, cannot be a subject of insurance.(2) The law of nations makes it the duty of a nation professing to be neutral, to abstain from assisting either belligerent to carry on a war, by furnishing soldiers, ships of war, arms, or warlike stores.(3) The trade thus interdicted to neutrals is denominated contraband, but in determining what particular articles of merchandize are contraband of war, Mr. Marshall says, (4) 'much depends on the power of the party, whether belligerent or neutral,' who is deciding the question. A belligerent, possessing a powerful naval force, has an interest in making the list of contraband articles numerous. 'Ship timber, going to a port of naval equipment,'(5) pitch and tar,(6) sail cloth,(7) hemp, fit to be used in equipping ships,(8) sheathing copper,(9) a ship, intended to be sold for the purpose of being used as a privateer,(10) and also provisions of a kind commonly used as sea-stores, destined to a port of naval equipment,(11) have been adjudged by Sir William Scott to be contraband of war.

Vattel (12) says, that provisions may be contraband of war, if destined to a place which one of the contending parties is at-

- (1) Gibson & al. v. Mair, 1 Marsh. Rep. 39; Gibson v. Service, 1 Marsh. Rep. 119; S. C. 5 Taunt. 433.
(2) 6 Mass. Rep. 114.
(3) 1 Macca-bees, ch. 8. v. 26; Grot. Lib. 3. c. 1. s. 5; Vattel, lib. 3. c. 7. n. 103, 104.
See also Robinson's Col. Mar. p. 54, 63, 123, 184.
(4) p. 78.
(5) The Endraught, 1 Rob. 25.
(6) The Sarah Christina, 1 Rob. 241; The Twee Juffrowen, 4 Rob. 242; The Richmond, 5 Rob. 325.
(7) The Neptuneus, 2 Rob. 108.
(8) The Gute Gesellschaft Michael, 4 Rob. 94.
(9) The Charlotte, 5 Rob. 275.
(10) The Richmond, 5 Rob. 330.
(11) The Jonge Margaretha, 1 Rob. 189; The Ranger, 6 Rob. 125.
(12) lib. 3. c. 7. s. 112.

(1) 2 Val.
264, tit. des
prises, a. 11.

(2) The Jonge
Margaretha, 1
Rob. 189;
The Frau
Margaretha, 6
Rob. 92; The
Zelder Rust,
6 Rob. 93.
(3) The Em-
manuel, 2
Rob. 198.
(4) The Jonge
Margaretha,
194; The
Jonge Tobias,
1 Rob. 329.

(5) 2 Val. 264,
tit. des prises,
a. 11. Robin-
son's Col.
Mar. 158.
(6) 6 Mass.
Rep. 113.
(7) Seton v.
Low, 1 Johns.
Cas. 1; Skid-
more v. Des-
doity, 2 Johns.
Cas. 77;
Juhel v.
Rhinelanders,
2 Johns. Cas.
120, & 487.

tempting to reduce by famine. The writers of the continent of Europe generally lay down the position that provisions are not contraband of war, unless destined to a place besieged or blockaded.(1) In regard to this article, and also cloth, hemp, saddles, harnesses, and other articles used for ordinary purposes of necessity, convenience, or luxury, as well as in military and naval equipments, Sir William Scott considers their character, as contraband of war or not, to depend upon the place to which they are destined. If they are going to a belligerent port, where articles of the same kind are used for warlike purposes, he considers them contraband of war.(2) It has been held by the same judge that a war renders trade by a neutral between a belligerent country and its colonies contraband, at least, where the trade is not permitted to the neutral nation in time of peace;(3) and in general he considers the circumstance, that the goods are not exported from the country in which they were produced, as an ingredient in their contraband character.(4)

The writers and courts of countries more frequently neutral than belligerent, and of countries of small naval power, maintain, on the other hand, that the principle of contraband trade should be very strictly confined to warlike implements and munitions, and supplies evidently intended for military purposes. It is not easy to point out any specific distinction between the principles assumed by the respective parties in this controversy, who disagree only respecting the application of the same general principles to particular articles, or to certain kinds of trade. The character of many articles, in this respect, depends upon a variety of circumstances, and though the general principles, by which they are to be distinguished as contraband or not, should be perfectly well settled and agreed upon, yet great room will unavoidably be left for the exercise of the arbitrary discretion of the judge, in allowing more or less weight to positive testimony, the circumstances of each particular case, and the political relations of the parties.

Every kind of property belonging to the subject of a neutral state, destined to a blockaded port, or besieged town, is contraband of war.(5)

Chief Justice Parsons says, 'We know of no case, where a neutral merchant has been punished by his own sovereign, for his contraband shipments.'(6) He says there is no distinction in this respect between an interloping trade, and a trade in articles contraband of war, and the same opinion seems to be entertained in New York,(7) and it is universally held to be no violation of the laws of one country, for its subjects to carry on an interloping trade in another. It is said that this right of the neutral to evade a blockade, and to trade in articles contraband of war, is similar to his right to transport the goods of a belligerent which the other belligerent may seize, and he may detain and carry the neutral vessel into port for the purpose of making a seizure of the goods. But there seems to be this distinction between a trade in articles contraband of war, and an interloping trade, that one exposes the goods to condemnation under the

laws of a particular country, the other under the law of nations. The trading in articles contraband of war has, in some instances, been punished by Sir William Scott, as an offence against the law of nations, by condemning, not only the specific goods, but also other goods belonging to the same shipper, and the ship in which the goods were carried,(1) or by refusing to allow freight,(2) in cases which he considered as attended with circumstances of great aggravation. If the law of nations authorizes such condemnations, it necessarily makes such voyages illegal, for that law is the law of each particular state; and if the voyage be illegal, the property cannot be the subject of insurance.

No contract is lawful which is obviously inconsistent with the object and policy of laws in general; or which involves the violation of decency or good morals; or is directly and plainly opposed to the interests and welfare of society.(3) It was doubted whether the military commander of a post might insure it against capture, as the public interest requires that he should have the strongest motives to defend it. The insurance was, however, held to be valid in the particular case, as the place though called a fort was a mercantile, rather than a military establishment, and the commander had goods in it to the amount insured.(4)

In the course of the year 1770, and afterwards, sundry policies were made in England concerning the sex of a person resident there, and known by the name of the Chevalier D'Eon, in which the underwriters agreed to pay a loss 'in case the person so called should in reality be a woman.' In an action upon one of these policies, Lord Mansfield said, 'the chevalier might have complained to the court, that it was a shameful and indecent trial; a wager of two gamblers at my expense;' and the contract was decided to be void, on the ground that an action upon it led to the introduction of indecent testimony, by which the character and peace of mind of a third person would be affected.(5) This policy was a wager, the opinion did not however turn upon this circumstance, but upon that of its being *contra bonos mores*, and against the rights of a third person.

Upon the same ground, wagering policies have been held void in Massachusetts, and accordingly no action can be sustained upon them; 'no precedent of such an action, says Chief Justice Dana, has been produced, and I believe none can be produced. As wager policies are injurious to the morals of the citizens, and tend to encourage an extravagant and peculiarly hazardous species of gaming, they ought not to receive the countenance of this court.'(6) 'They are,' says Chief Justice Parker, 'against the policy of our laws.'(7) The principles of the British statute against gaming policies have been adopted also in Pennsylvania.(8) These insurances have, however, been considered to be legal in New York.(9)

In England a wagering policy is not considered to be necessarily, and by its essential character as a wager, so injurious to

- (1) *The Stadt Embden*, 1 Rob. 26, & n.; *The Jonge Tobias*, 1 Rob. 329; *The Sarah Christina*, 1 Rob. 242; *The Ringende Jacob*, 1 Rob. 91; *The Edward*, 4 Rob. 68; *The Ranger*, 6 Rob. 126.
- (2) *The Mercurius*, 1 Rob. 268.
- (3) *Mount v. Waite*, 7 Johns. 434; *Jones v. Randall*, Cowp. 37, Loft, 383.
- (4) *Carter v. Boehm*, 3 Bur. 1905. S. C. 1 Bl. 593.
- (5) *Da Costa v. Jones*, Wesk. tit. wager, a. 3; S. C. Cowp. 729; *Roebuck & al. v. Hammerston*, Cowp. 737.
- (6) *Amory v. Gilman*, 2 Mass. Rep. 1. See also *Stetson v. Mass. Mut. F. Ins. Co.* 4 Mass. Rep. 336.
- (7) *Lord v. Dall*, 12 Mass. Rep. 118.
- (8) *Pritchett v. Ins. Co. of N. A.* 3 Yates, 461.
- (9) *Clendinning v. Church*, 3 Caines, 141; *Juhel v. Church*, 2 Johns. Cas. 333.

- (1) *Le Pypre v. Farr*, 2 Vern. 716.
 (2) *Allen v. Hearne*, 1 T. R. 56; *Atherford v. Beard*, 2 T. R. 610.
 (3) *Mollison v. Staples*, Park. 640. n. See also *Wharton v. De La Rive*, Park. 573; *Marshall*, 642. n.
 (4) *Mount v. Waite*, 7 Johns. 434.
 (5) Ord. h. t. a. 10; *Estrangin's Poth. h. t.* No. 27. n.
 (6) 1 Emer. 198. c. 8. s. 1.
 (7) 1 Emer. 233. c. 8. s. 10; *Lucena v. Craufurd*, 2 N. R. 294, Wesk. tit. wages.
 (8) *Webster v. De Taastet*, 7 T. R. 157.
 (9) 1 Mag. 18.
 (10) *Galloway v. Morris*, 3 Yeates, 445.
 (11) *King v. Glover*, 2 N. R. 206; *Foster v. Hoyt*, 2 Johns. Cas. 327.

Captain's wages.

morals and inconsistent with the public interest, as to be void upon the universal and obvious principles recognized by all systems of laws, as their foundation, and as implicitly incorporated with them.(a) Yet the chancellor required proof of interest, in one case, on a wager policy.(1) If the wager, whether by a policy or otherwise, creates a bias in the discharge of a public duty, or is against the policy of the laws and the public interest, it is void.(2) And it was probably upon this ground that Lord Mansfield said, 'though every man had an interest in the events of war and peace, yet he doubted whether that was an insurable interest.'(3)

A policy made in New York upon a ticket in a lottery out of that state, was held to be illegal on the ground that a contract is void 'if it be against the principles of public policy, equally as if it contravened a positive law;' and though there was no law prohibiting this insurance, yet insurance of the tickets of lotteries within the state was prohibited by a statute, the reasons of which, as alleged in the statute, were, that such insurances are against public policy, and of an immoral tendency; and the court say, the reasons of the act extend to all insurances of lottery tickets though not comprehended in its express provisions.(4)

The insurance of the life of a freeman is prohibited in France,(5) because it is said to be above price, and is not a subject of commerce, and it is wrong to allow it to be a matter of commercial speculation; and because such an insurance is a wager, and tends to instigate men to crimes.(6) Whether it induces men to commit crimes, will depend very much upon the state of morals; no such tendency has been perceived to belong particularly to this species of insurance, where it has been allowed. In regard to its being a wager, proof of interest is required under this species of policy, as well as any other.

The wages of mariners are universally considered not to be insurable; not on account of the insufficiency of the interest and risk, but lest their motives to exertion for the safety of the ship and cargo should be diminished.(7) The mate's wages are not insurable, nor is any privilege he may have in the vessel instead of wages, as where he had a privilege of three slaves as a part of his wages. But he may insure his property on board,(8) though bought with the money received as wages.(9) A mariner having a privilege of carrying a certain quantity of goods, may insure the goods, for it is the freight, and not the goods themselves, that constitute a part of his wages.(10)

But the captain may insure his wages, commissions, or his privilege on board of the vessel, as he is supposed to be a man of more trust than the sailors.(11)

(a) *Da Costa v. Frith*, 4 Bur. 1966; *Dean v. Dicker*, 2 Str. 1250; *Thelluson v. Fletcher*, Doug. 301; *Goddart v. Garrett*, 2 Vern. 269; *Wittingham v. Thornborough*, Prec. in Chanc. 20, Wesk. tit. Lives, n. 7; *Good v. Elliott*, 5 T. R. 693; *Assievedo v. Cambridge*, 10 Mod. 77; *De Paiba v. Ludlow*, 1 Com. Rep. 361.

Section 3. Interest of a Mortgager.

The owner of property mortgaged, still retains an insurable interest to the full value.

The assignment of a bill of lading passes the entire and absolute property in the goods to the assignee, where this is the intention of the party making the assignment,(1) but if the bill of lading is assigned merely for the purpose of binding a consignment of the goods, and designating the person to whom the proceeds are to be paid over, such person being a creditor of the consignor, the consignor still retains an insurable interest, since he continues to be as directly concerned in the safety of the goods, as before assigning the bill of lading.(2)

A quantity of fish being shipped by Locke, upon which Barnard had advanced money, and to secure payment had taken a bill of lading, and made out the invoice, in his own name; it was held that Locke still had an insurable interest to the full value.(3)

In the case of an insurance of a ship by the owner, who had previously conveyed her by way of mortgage, Parker, C. J. in giving the opinion of the court, said, 'we are satisfied that the mortgage left an insurable interest in the mortgager, even if the ship were mortgaged to her full value. For it has been settled by many decisions, that different parties having different interests in the same subject matter, may severally cause insurance upon it.'(4)

The mortgager of a house still has an insurable interest in it.(5) And a debtor having mortgaged the freight of his vessel to a creditor, still holds an insurable interest, for he is the party on whom a loss must ultimately fall.(6)

Section 4. Interest of a Mortgagee or Trustee.

Mr. Justice Ashurst, says, a person to whom the freight of a vessel had been mortgaged, might insure the legal interest on his own account, and also the equitable interest on account of the mortgager. And Lord Eldon was of this opinion.(7)

A mortgagee is a trustee who must account to the mortgager for the property towards the satisfaction of his own debt, and pay over the surplus; and in regard to a trustee, Lawrence, J. said 'he has a legal interest in the thing, and may therefore insure;'(8) he may represent the property to be his own, and the policy may be in his own name.(9) So Lord Kenyon was of opinion that an executor, who, as such, and accordingly as trustee, held an annuity bond, thereby had an insurable interest.(10) And Lord Ellenborough says he may insure before probate of the will.(11)

Where a Spanish house, being indebted to an English merchant, consigned goods without his previous knowledge, to another English merchant, with instructions to hold a part of the goods

(1) *M'Andrew v. Bell*, 1 Esp. 373.

(2) *Hibbert v. Carter*, 1 T. R. 745.

(3) *Locke v. The N. A. Ins. Co.* 13 Mass. Rep. 61.

(4) *Higginson v. Dall*, 13 Mass. Rep. 96. See also *Alston v. Campbell* 4 Brown's Parl. Cas. 476.
(5) *Stetson v. Mass. Mut. F. Ins. Co.* 4 Mass. Rep. 330.

(6) *Smith v. Lascelles*, 2 T. R. 187.

(7) *Yallop ex parte*, 15 Ves. 60; *Houghton ex parte*, 17 Ves. 253.

(8) 2 N. R. 324.

(9) *Pratt & al. v. Phoen. Ins. Co.* 1

Browne, 267, cited *Wharton's Dig. h. t. No. 32.*

(10) *Tidswell v. Ankerstein*, Peake, 151.

(11) *Sterling v. Vaughan*, 11 East, 619.

(1) *Hill v. Secretan*, 1 B. & P. 315.

(2) *Murray v. Col. Ins. Co.* 11 Johns. 302.

(3) *Tasker v. Scott*, 6 Taunt. 234, 1 Marsh. Rep. 558.

(4) *Russel v. Un. Ins. Co.* 4 Dal. 421.

for the use of their creditor, such creditor was held to have an insurable interest in that part of the goods.⁽¹⁾ But where it was agreed that the *proceeds* of goods shipped by Lyman of New York, should be paid over to Sanson of London, who was ordered by Lyman to hold such proceeds, when received, for the use of Murray and Ogden of New York, his creditors; it was held that this did not give Murray and Ogden an insurable interest in the goods.⁽²⁾ Had the *goods* been consigned to Sanson, with the same instructions, this case would have been similar to the preceding.

Where the master took up money for the purpose of procuring supplies for the ship, and drew a bill on his owners, with orders to the drawee to insure, if the bill should be dishonoured; this did not give the holder of the bill an insurable interest in the ship.⁽³⁾

In 1804, a ship captured by a French privateer and carried into Havana, was claimed in behalf of British owners, and decreed to be restored to them. The captors appealed to the supreme council of war at Madrid. Felix Crucet, a merchant of Havana, gave bonds to the amount of 32,065 dollars, to be paid if the property should be condemned; and to secure him, the ship and cargo were put into his hands. He consigned them to Russell and Hill of New York, with orders to make insurance, which they did on his account. The vessel was captured, which brought up the question of Crucet's interest. Mr. Justice Washington said, 'Crucet appears clearly to have acquired a contingent interest in the property; but it was at first a question of great doubt with us whether it was an insurable interest. To the right of insurance the obligation of abandonment in case of loss would seem an indispensable incident; (a) and we doubted whether Crucet had any thing in the property which he could abandon. On reflection, however, we conclude, that, upon an abandonment, the underwriters acquire all Crucet's rights and remedies against the British owners.'⁽⁴⁾

Section 5. Interest of the Lender in hypothecated property.

A bottomry bond by which a vessel is pledged, and a respondentia bond by which a cargo is pledged, to a certain amount, advanced upon either, which give the lender the right of obtaining possession of the property hypothecated, for the purpose of satisfying his debt, are in some respects similar to a mortgage, and, like it, vest an insurable interest in the lender or creditor. The property pledged is not put into the possession of the lender, as in the case of a mortgage. Mortgaged property is also at the risk of the mortgager, but in bottomry, or respondentia, the ship or goods upon which the money is lent, are at the risk of the

(a) In the case of *Lucena v. Craufurd*, 2 N. R. 310, eight of the judges gave an opinion 'that the want of power to abandon was not a criterion of insurable interest.'

lender, to the amount lent, and he stands in the place of an insurer to that amount; and to compensate him for this risk, he receives a higher rate of interest.

There is greater reason why the lender on bottomry and respondentia, should have an insurable interest in the thing pledged, than that a mortgagee should have such an interest, for if the property is lost, he loses his debt, whereas, a mortgagee, still has his claim subsisting against his debtor. It has always been held that the lender has an insurable interest in the ship or goods hypothecated.⁽¹⁾

(1) *Harman v. Vanbatton*, 2 Vern. 717; *Williams v. Smith*, 2 Caines, 13. S. C. 2 Caines' Cas. 110; 1 Emer. 237, c. 8. s. 11; *Kenny v. Clarkson*, 1 Johns. 385; *Glover v. Black*, 3 Burr, 394, 1 Bl. 396.

Section 6. *Interest of the Borrower in hypothecated property.*

The borrower on bottomry or respondentia, may have an insurable interest in the property pledged, no less than a mortgager, but with this distinction, that the mortgager remains liable for the whole loss upon the goods; if they are lost no part of his debt is discharged; whereas if the hypothecated ship or goods are lost, the borrower is discharged from his debt. If therefore, they are hypothecated for the full value, the borrower is not interested in their safety, for if they are saved, they go to satisfy the debt, if they are lost by the risks within the hypothecation, he is discharged from the debt. He is accordingly interested only as far as the value of the property exceeds the amount for which it is pledged. It has accordingly been decided, that the owner of a vessel bottomried for more than its full value, has no insurable interest.^(a)

Nothing, however, prevents the parties to an hypothecation, from agreeing that the lender shall assume only the sea-risks or the risk of capture. In such case the borrower would still retain an insurable interest in the property, to its full value, in relation to the risks not assumed by the lender.

Section 7. *Interest of a Consignee, Factor, or Agent.*

As a consignee, factor, or agent, has a lien on goods, to the amount of his advances, acceptances, and liabilities, he stands in this respect precisely in the situation of a mortgagee. A debt is due to him from his principal, for which he holds the property as collateral security, and the property is at the risk of the principal, as the debt would still subsist, though the property should be lost; and the excess over the proceeds of the goods would be still due to him, in case of the proceeds being

(a) *Williams v. Smith*, 2 Caines, 13. S. C. 2 Caines' Cas. 110. The statute of the 19th Geo. II. c. 37, limits the insurable interest of the owner of an hypothecated ship or goods bound on an East India voyage, to 'the value of his interest in the ship, or in the goods on board, exclusive of the money so borrowed.'

insufficient to satisfy his claims. He has therefore an insurable interest in the goods to the amount of his lien. And whether the lien arises from expenses and charges on account of the specific goods, or is a general balance, can make no difference; if the lien exists it involves an insurable interest. A consignee or factor, has not, as such, in all cases, an insurable interest on his own account in the property to its full value; his interest is only commensurate with the loss he may sustain by the destruction of the property; it is limited to the extent of the lien he has, or will have when the property comes into his hands.

There are various sorts of consignees, agents, and factors, some having authority to sell the property, others to take possession of it only. Nor is it settled that all persons who may make something by selling or keeping property, or contracting in regard to it, have therefore an insurable interest. It is questionable whether a broker employed to sell a house, would have an insurable interest in it to the amount of his commissions. If an agent or consignee has a subsisting demand, for which the property is pledged, or will become so on its coming into his hands, the principal having in the latter case consigned it to him, or otherwise having given him a right to take possession of it, he unquestionably has an insurable interest.

Interest of a
supercargo.

A supercargo who is to receive a compensation out of the homeward cargo, as he begins to render his services at the commencement of the voyage and so continues, sustains an absolute loss of his time and skill in case the cargo does not arrive. An insurance upon his interest is, therefore, strictly a contract of indemnity. And it is held, in general, that a person having a contract, which may afford him a profit or emolument, has an insurable interest in respect to the subject of such contract, as soon as he has done something, or begun to incur expenses and take steps, towards the execution of it. And where the owners of a cargo agreed to pay the supercargo ten thousand dollars 'out of the proceeds of any cargo the ship might bring from Batavia, or to deliver him part of such cargo to that amount,' on the ship's arrival at New York; it was not made a question, that the supercargo had an insurable interest to that amount.⁽¹⁾

A quantity of moss shipped in Norway was consigned to the Cudbear Company, so called, of London, who refused the consignment, upon which Wolff and his partner, having no particular authority, otherwise than as being the general agents of the consignor, effected insurance, retaining the bills of lading in their own hands, and accepted bills on account of the consignment to the amount of 300*l*. Their proceedings were subsequently approved of by the consignor. They were held to have an insurable interest to the amount of their acceptance. Buller, J. said, 'I agree that a debt which has no reference to the article insured, and which cannot make a lien on it, will not give an insurable interest. But a debt which arises in consequence of the article insured, and which would have given a lien on it, does give an insurable interest.'⁽²⁾

(1) Robinson v. New York Ins. Co. 2 Caines, 357; New York Ins. Co. v. Robinson, 1 Johns. 616. See also Flint v. Le Mesurier, Park, 403.
(2) Wolff v. Horncastle, 1 B. & P. 316. See also Conway v. Gray, 10 East, 536; Russel v. Union Ins. Co. Whart. Dig. h. t. No. 10.

Where goods were shipped by Meybohm at St. Petersburg, to Amyand, of London, to whom a general balance was due from Meybohm; though the bill of lading was endorsed by Meybohm to Tamesz, another Russian, Lord Mansfield, and the other judges, held that Amyand had an insurable interest in the goods. 'Various persons may insure various interests on the same bottom; here Mr. Amyand had an interest of his own, distinct from the interest of Meybohm; he had a lien upon these very goods, as a factor to whom a balance was due.'(1)

(1) *Godin v. Lond. Ass. Co.* 1 Burr. 489.

In the case of ships captured and carried into Spain, where a compromise was made with the captors by giving up a part of the cargoes, and expenses were incurred on account of the property by Cowan, who consigned a part of it to Robertson in England, on whom he drew bills for his expenses and disbursements, which Robertson accepted; it was held that Robertson acquired an insurable interest by accepting the bills. And the circumstance, that the original owners had, in the mean time, abandoned the property to their insurers, was held not to affect Robertson's interest.(2)

(2) *Robertson v. Hamilton*, 14 East, 522.

Lord Ellenborough, however, seemed to think that an agreement for a commission on such freight as the assured might procure for a vessel owned by another person, did not give an insurable interest. Knox, of Dublin, had an agreement with a house at Jamaica for loading such vessel as he should send to that island, and he agreed for a vessel to go out to Jamaica for a cargo, on the freight of which the owners were to allow him a commission. The vessel was detained at Jamaica so long, under an admiralty process, that she lost the season, and the Jamaica house sent on their goods by another, and Knox accordingly failed of receiving the stipulated commission. The judge said, 'it strikes me that this was a mere expectation. The assured had an interest in the ship, only in the expectation of a cargo. This case carries us into the land of dreams, and if supported, would introduce the practice of insuring 2000 pounds prize in a lottery, without purchasing a ticket.'(3) But it is not easy to distinguish the interest of Knox in this case, from what has been allowed under policies on lives and on profits to constitute an insurable interest. A case occurred in Massachusetts upon a policy on the commissions that the assured expected to receive as consignee of a vessel, and no objection was made on the ground of the insufficiency of the interest.(4)

(3) *Knox v. Wood*, 1 Camp. 541, reported differently by Park, 405.

(4) *Law v. Goddard*, 12 Mass. Rep. 112.

If an agent advances money, or has a lien on goods, which become enemy's property and are captured, he cannot claim the amount of his lien against the captors;(5) and therefore he would not retain an interest which he could insure, for the reasons given against insuring enemy property. Though the agent might be a neutral or the citizen of the country of the captors, his own national character would not change that of the property to the extent of his lien. Chief Justice Marshall was absent when this opinion was given, and Mr. Justice Washington dissented. The opinion is, however, supported by that of Sir

The interest of the agent is lost if the goods become enemy's property.

(5) *The Frances*, 8 Cranch 418.

William Scott, in the case of the bottomry of an enemy's ship to an Englishman.⁽¹⁾

(1) *The Tobago*, 5 Rob. 218.

If the master of the vessel be supercargo and consignee, he will have the same insurable interest that any other agent would have under like circumstances; but as master he is not a trustee of the property but merely a carrier, and has no insurable interest in the ship or cargo.⁽²⁾

(2) *Barker v. Mar. Ins. Co.*
2 Mason's Rep.

Section 8. Interest in Profits.

As a person, who is not owner of property, such as an agent or consignee, may insure his commissions, there seems to be as good reason why the owner should have the right of insuring the profits he expects to derive by its transportation, or any legal use he may propose to make of it. This interest is frequently insured; nor does this species of insurance partake at all of the nature of gambling. Lawrence, J. giving the opinion of the court, said, 'as insurance is a contract of indemnity, it cannot be said to be extended beyond what the design of such species of contract will embrace, if it be applied to protect men from those losses and disadvantages, which, but for the perils insured against, the assured would not suffer; and in every maritime adventure, the adventurer is liable to be deprived, not only of the things immediately subjected to the perils insured against, but also of the advantages to be derived from the arrival of those things at their destined port. If they do not arrive, his loss is not merely that of his goods, but of the benefits which he might obtain, were his money employed in an undertaking not subject to the perils. If it be allowable for the merchant to protect capital, subject to the risks of maritime commerce, by insuring it; why may he not protect those advantages he is in danger of losing by their being exposed to the same risks? It is surely not an improper encouragement of trade to provide that merchants, in case of adverse fortune, should not only not lose the principal adventure, but that the principal should not in consequence of such bad fortune be totally unproductive; and that men of small fortunes should be encouraged to engage in commerce by their having the means of preserving their capitals entire.'⁽³⁾

(3) *Barclay v. Cousins*, 2 East, 544.

Whether the assured must show that there would have been a profit.

(4) *Grant v. Parkinson*, Park, 402.

It has been held in many of the English cases that, in order to create an insurable interest in profits, it must appear that there would probably, at least, have been a profit, had the property arrived at the place to which it was insured. In an action upon a policy 'on the profits expected to arise on a cargo of molasses,' belonging to the assured, who had a contract to supply the army with spruce beer, in the manufacture of which the cargo was intended to be used; Lord Mansfield, and the other judges, were of opinion that this was a sufficient interest, the ground of the opinion being, that as the assured was owner of the cargo, and had a contract to supply the army, if the cargo arrived, 'his profits were pretty certain.'⁽⁴⁾

Insurance being effected 'on profits valued at 400*l*.' on a voyage in the slave trade, the court held that to give the assured an interest, it must appear that a profit would have been realized. The case was decided against the assured, because he 'did not show that if the slaves had all got to a market, any profit would have been produced.'⁽¹⁾

The same principal was adhered to in an insurance on the profits of a cargo of flax, from Riga to Hull, in which Lord Ellenborough considered the insurable interest to depend on the fact, that there would have been a profit, had the cargo arrived.⁽²⁾

But in New York, under a policy on profits, where three eighths of the goods were lost, the court held it to be a loss of that proportion of the profits, under the policy, without inquiring whether there would have been any profits had the goods arrived.⁽³⁾

In another case this subject was examined by Kent, J. in whose opinion the other judges concurred. After saying that profits are insurable in England, and that freight had been held to be insurable in New York, and remarking that there is a great similarity in freight, profits, and commissions, the first being profits to arise out of the employment of the ship, the two last on the goods, he proceeds; 'These insurances on freight, profits, commissions, &c. are said to be founded on the course and interests of trade, and are greatly conducive to its prosperity. The doctrine, however, that runs through all the cases, is, that the assured must have an interest in the subject matter, from which the profits are to proceed, in order to prevent the policy from being considered a wager. Policies on profits or freight, if the assured be owner of the subject, which is to create them, are not wagers, but policies on a real and substantial interest.'⁽⁴⁾ No suggestion was made that a loss under the policy would depend on the fact that a profit would have been realized, had the goods arrived. The only question as to interest, was, whether the assured owned the goods. In a subsequent case, Livingston, J. giving the opinion of the same court, said, 'It does not follow that a profit will be made if the cargo arrive, yet its loss would give a right to recover on such a policy.'⁽⁵⁾

In Connecticut the court gave an opinion that, 'an interest in the vessel and cargo, gives an interest in the profits. Such an interest in the expected profits is an insurable interest.' The insurers made the objection, that 'it did not appear, that if the vessel had arrived safely at her port of delivery, any profits would have been produced.' The court does not appear to have regarded this objection.⁽⁶⁾

(1) *Hodgson v. Glover*, 6 East, 316.

(2) *Eyre v. Glover*, 16 East, 218.

(3) *Loomis v. Shaw*, 2 Johns. Cas. 36.

(4) *Abbott v. Sebor*, 3 Johns. Cas. 39.

(5) *Mumford v. Hallett*, 1 Johns. 439.

(6) *Foedick v. Norwich M. Ins. Co.* 3 Day, 108.

Section 9. Interest of Captors and Prize Agents.

Captors and prize agents have an insurable interest in the captured property, where they are interested in its condemnation.⁽⁷⁾ In 1782, the British land and naval forces, in conjunc-

(7) *Poth. b. t.* n. 38.

Omoa case. tion, captured some vessels and their cargoes at Omoa, in India, and one of those ships, the *St. Domingo*, being insured on account of the officers and crews of the capturing vessels, it was made a question whether they had an insurable interest. The case turned partly on the statute granting a share of prize money to the commanders and crews of capturing vessels. The court held, that if they were entitled to any share of the prize money, under that statute, there could be no doubt of their having an insurable interest in the prize. 'But,' said Lord Mansfield, 'supposing that doubtful; as far back as Queen Ann's time down to the present, wherever a capture has been made by a king's ship or a privateer, the crown has always given a grant of it after condemnation. Is then the contingency of the ship's coming safe such an interest as the captor may insure? Insurance is a contract of indemnity; some interest is necessary, but not any particular form of interest; it does not depend on a vested formal interest. The question is, whether this contingency is such a benefit to the assured, as will make a loss to him if the ship does not arrive? An agent of prizes may insure the arrival of a ship, which will produce him a profit; for though he has not the possession of the property, he has such an interest in the ship coming home, as that he may insure. Here the possession is in the assured, and a certain expectation of receiving the property captured, from the crown, which gives him an interest in the arrival. It is not a vested interest, but such an expectation as never was defeated.' And the assured were held to have an insurable interest.(1)

(1) *Le Cras v. Hughes*, Park, 406.

A case was decided in favour of the assured in the time of Lord Kenyon, upon an interest very similar to that of the assured in the *Omoa case*. The ship *Westcapelle* and her cargo had been captured as Dutch, and were claimed in behalf of Theodore Lyman and other American owners, to whom the property was restored. The captors, having made insurance, refused to pay the premium, alleging a want of interest. Lord Kenyon said, 'the assured had possession of the property, and from that possession certain rights and duties resulted. If it was a legal capture, the captors were entitled; if the capture was improperly made, they were liable to be called to account in the court of admiralty, where they might be amerced in damages and costs. It was important to them to take care that there should be something forthcoming to answer the amount of those damages. On this ground, therefore, I am clearly of opinion that the assured had an insurable interest.' The other judges gave substantially the same opinion.(2)

(2) *Boehm v. Bell*, 8 T. R. 154.

(3) *Lucena v. Craufurd*, 2 N. R. 323.

But Lord Eldon says, 'If the *Omoa case* was decided upon the expectation of a grant from the crown, I never can give my assent to such a doctrine.'(3) And Lord Ellenborough, giving the opinion of the court in a similar case, said, that if on the arrival of the ships, 'the crown had made a grant to the captors, it might have been of the whole, or of a part, and a very inconsiderable part only. To what extent could they insure? Not to the whole value, because the grant might only have been of

part; nor of any given part, because it must have been uncertain what part, if any, would have been granted.⁽¹⁾

The interest of captors and prize agents, and the subject of insurable interest in general, were very elaborately and learnedly discussed in the different courts of England, in some cases arising under policies upon Dutch ships and cargoes, seized under an act of parliament⁽²⁾ in contemplation of the declaration of war against Holland in 1795. The king appointed commissioners, who were authorized to take such ships and cargoes, as might be detained or brought into Great Britain under that act, into their possession, to be managed and disposed of according to such instructions as they should receive. Some ships being seized and carried into St. Helena, the commissioners effected insurance upon them in their own names, for whom it might concern. A loss occurred, and the insurers resisted payment on the ground that neither the commissioners, nor the king, nor the captors, nor any others in whose behalf the commissioners had authority to insure, had an insurable interest. The first arguments were made in 1798 in the court of King's Bench, where it was adjudged that the commissioners themselves had an insurable interest, as trustees.⁽³⁾ The question was argued in the Exchequer Chamber three times, in 1800, 1801, and 1802, before the twelve judges, who were divided in opinion; but a majority concurring with the King's Bench, the former judgment was affirmed.⁽⁴⁾ It was then carried to the House of Lords, where the judges of the different courts gave their opinions severally at great length. Seven of them were of opinion that the commissioners, as such, had an insurable interest in the property to its full value. They say this case is not like insurances on profits or commissions, since the assured profess to be interested only as commissioners, and not personally, and therefore the rules as to the certainty of profits or commissions, to make them insurable, do not apply. They were consignees, agents, or trustees for others, and it is to be understood that the insurance was made for the benefit of those, for whom they were to manage the property, that is, in this case, for the king. They say the intention of parliament was to give the commissioners the same control of this property that an owner has, and therefore to give them a power to insure. They were accordingly of opinion that the commissioners might allege an insurable interest in themselves. As to the objection that the interest might have been granted away by the crown before the ships arrived, and therefore was contingent, they made the same reply that was made by Lord Kenyon and the other judges of the King's Bench originally, namely, that a vested indefeasible interest is not necessary to constitute an insurable interest, for a consignee of goods purchased by him on credit has only a contingent interest, since the vender has a right to stop them *in transitu*, in case of the consignee's insolvency; yet such a consignee unquestionably has an insurable interest.

(1) Routh v. Thompson, 11 East, 432. But see S. C. 13 East, 274.

(2) 3 B. & P. 13. n.

(3) Craufurd v. Hunter, 8 T. R. 13.

(4) Lucena v. Craufurd, 3 B. & P. 75.

Thompson B. concurred in this opinion generally. But Judges Chambre and Lawrence thought that the commissioners had not an insurable interest until the ships had arrived in England. Their opinion on this point turns wholly upon the construction of the commission. Lord Eldon agreed with them on this point. Considering it as an expectation of an interest, he says, 'I have in vain endeavoured to find a fit definition of that which is between a certainty and an expectation; nor am I able to point out what is an interest, unless it be a right in the property, or a right derivable out of some contract about the property. I cannot accede to the doctrine that unascertained profits, which may or may not be made, may be insured.' Speaking of the *Omoa* case, where the captors had not an interest in the prizes under any act of parliament, but only an expectation of a grant, he said, 'the captors not only had the possession coupled with the liability to pay costs and charges, if they had taken possession improperly; there was also a liability to render back property which should turn out to be neutral, and a liability as agents to act for the king as their principal, and he should be disposed to say that the king had an insurable interest, as the person who had the right of possession.' He was accordingly of opinion that the commissioners in this case, though they had not themselves an insurable interest, and could not allege their own interest, might yet avail themselves of the policy, as agents for the king. Lord Ellenborough and Lord Erskine concurred in this opinion, and the decision of the court was in conformity with it.⁽¹⁾

(1) *Lucena v. Craufurd*, 2 N. R. 269.

In a subsequent case, a Spanish prize had been captured at Monte Video by the land and naval forces jointly. A Mr. Blacker was appointed by the naval and military commanders to act 'on behalf of all interested in the capture,' who gave orders to insure the prizes. Blacker had no authority from the king. The officers were entitled to a share in the prizes under an act of parliament. But it was objected to their interest, that the crown might grant away the prizes before they were condemned; Lord Ellenborough said, that the right of stopping *in transitu* did not defeat the insurable interest of a consignee. 'The indefeasibility of the property is not therefore the criterion of an insurable interest. What is the case of an executor? Probate is necessary to complete his title, yet before probate he has a title sufficient to enable him to insure.' He accordingly was of opinion that the captors had an insurable interest, and this was the judgment of the court.⁽²⁾

(2) *Stirling v. Vaughan*, 11 East, 619; 2 Camp. 225.

(3) 1 Gal. 558, *The Joseph*.

(4) 5 Rob. 181, *The Elsebe*; and see *Routh v. Thompson*, 11 East, 428; and 13 East, 274; *Nicol v. Goodall*, 10 Ves. 157.

An insurable interest in prizes can be acquired only by a grant from the government. Mr. Justice Story says, 'The sole and exclusive right, as to all prizes, rests in the government, and no individual can acquire any interest therein, unless under their grant and commission, and all captures, made without such grant and commission, enure to the use of the government.'⁽³⁾ Sir William Scott said the same; 'no man has or can have any interest but what he takes, as the mere gift of the crown; beyond the interest of that gift, he has nothing.'⁽⁴⁾

Section 10. Interest of the Charterer of a ship.

As far as a charterer of a ship is liable to damage by its loss, he has an insurable interest. The owner of one half of a schooner hired the other half, with an agreement that in case of its being lost within the term of the charterparty, the charterer, Oliver, should pay Mayberry, the other part-owner, the value of his moiety. He then insured the schooner to its full value on his own account. The schooner being lost, the question of insurable interest was made. In giving the opinion of the court, Chief Justice Parsons said, 'by virtue of this contract, Oliver had a special property in Mayberry's moiety, which was at his risk, and he might indemnify himself against loss by causing himself to be insured.'⁽¹⁾

(1) *Oliver v. Greene*, 3 Mass. Rep. 133.

According to Lord Ellenborough's instruction to the jury in one case, Mayberry might, in the preceding case, still have insured his half of the schooner on his own account. Hobbs the owner of a ship had chartered her to Woodman, who covenanted that if the ship should be lost, he would pay Hobbs 3,600*l*. Hobbs insured the ship on his own account, and it was lost. It was objected that as Woodman was to pay for the ship in case of loss, Hobbs had no insurable interest. Lord Ellenborough said, 'he was not bound to trust exclusively to the credit of Woodman, but might likewise protect himself by insurance.'⁽²⁾ If the agreement with Woodman extended to the loss of the ship by the perils insured against in the policy, this was plainly a double insurance; but under the form of policy used in England, this would raise no objection to the claim of the assured.

(2) *Hobbs v. Hannam*, 3 Camp. 93.

An agreement by the charterer to insure the ship, has been held to give him an insurable interest, in the same manner as an agreement to pay for her if lost. The court said, 'the assured must have a *bona fide* interest, but that interest may exist without a legal title to the property.'⁽³⁾

(3) *Bartlett & al. v. Walter*, 13 Mass. Rep. 267.

Section 11. Interest in Freight.

The owner of a ship, navigated on his account, has an insurable interest in the freight. In regard to the commencement of this interest, it is a general rule that it commences not only by the vessel's sailing with the cargo on board, but also when the owner, having goods ready to ship, or a contract with another person for freight, has commenced the voyage, or incurred expenses and taken steps towards earning the freight. But if the ship is not ready to proceed on the voyage, and expenses have not been incurred towards earning the freight, as where the ship is lost while careening, and before she is ready to take the cargo on board,⁽⁴⁾ the interest in the freight has not commenced.

Mr. Justice Hosmer says, 'Freight sometimes denotes the compensation for the use of a ship, and sometimes a compensation for the transportation of merchandize. When the vessel is

(4) *Tonge v. Watts*, 2 Str. 1251.

hired, so soon as the voyage is entered on, the right to freight commences. So soon as the ship breaks ground, the hire of the ship is at risk, and constitutes a legal subject of insurance. If the freight be derivable from the transportation of merchandise, the right commences when the goods are put on board; or, at farthest, when a part have been received, and the rest are ready to be shipped.⁽¹⁾

(1) *Riley v. Hartford Ins. Co.* 2 Connect. Rep. 373.

Insurance being effected on the freight of a ship chartered to go to Teneriffe, and there take a cargo for the West Indies, and the ship being lost on the voyage to Teneriffe, before the cargo was taken on board under the charterparty, it was objected that the insurable interest had not commenced at the time of the loss. It was however held that the interest had commenced, and Lord Kenyon said, 'it now seems admitted that if the contract had its inception, if any thing were done under it by the assured, his right to freight commenced.'⁽²⁾

(2) *Thompson v. Taylor*, 6 T. R. 478. See also *MacKenzie v. Shedden*, 2 Camp. 431.

It was again held in the same court, where the freight was valued at 1500*l.* and goods had been put on board, of which the freight would have been 500*l.* the rest of the cargo being ready to be shipped, when the vessel was driven from her moorings and lost, that the insurable interest in the *whole* freight had accrued, and the assured was entitled to the whole sum insured.⁽³⁾

(3) *Montgomery v. Eggington*, 3 T. R. 362.

In a case upon a policy on freight 'from New York to Wilmington, and thence to Barbadoes,' the assured had bought a cargo of staves, which were to be taken on board at Wilmington, had not the vessel been lost on the way thither. Mr. Justice Washington held that the interest in the whole freight commenced, at the time of the vessel's sailing from New York.⁽⁴⁾

(4) *Hart v. Del. Ins. Co.* Condry's Marsh. 281. n. Wharton's Dig. 337. h. t. No. 186.

'The freight of goods laden or to be laden' being insured, a part of a cargo was taken on board at Gibraltar, and the ship was proceeding towards the Cape de Verd Islands, with funds on board to purchase salt there to make up the cargo, when she was lost. It was held that the insurable interest had commenced only in respect to the goods shipped at Gibraltar.⁽⁵⁾

(5) *Riley v. Hartford Ins. Co.* 2 Connect. Rep. 368.

An open policy was made on the freight of the ship *Marquis of Lansdown*, at and from *Dominica* to *London*, the owner of which had a charterparty for a full freight, outward and homeward, or for dead freight, if a cargo should not be supplied, and while the ship lay at *Dominica* ready to take on board the cargo, she was captured. Lord Ellenborough said, 'the existence of the charterparty, giving an entirety to the contract of freight, was decisive, the voyage having once commenced.'⁽⁶⁾

(6) *Horncastle v. Stuart*, 7 East, 400.

In the case of insurance on freight and passage money, from *India* to *Europe*, a contract for the freight of goods and the passages of 40 invalids had been made, and the ship had been altered for the accommodation of the passengers, and a greater part of the goods had been taken on board, when the ship was lost; it was held that the owner had an interest in the whole freight and passage money, at the time of the loss.⁽⁷⁾

(7) *Trascott v. Christie*, 2 Brod. & Bing. 320.

The freight of the ship *Cheswick*, at and from any ports in *Hayti* to *Liverpool*, being insured in a valued policy, the ship

was lost by the perils of the seas, when she had discharged a part of her outward cargo, and taken in 55 bales of cotton of her homeward cargo, at Jaquemel, and was proceeding thence to Aux Cayes, to discharge the rest of her outward, and take in the rest of her homeward cargo. Upon these facts, Lord Ellenborough said, 'In every action on such a policy, evidence is given, either that goods were put on board, from the carriage of which freight would result, or that there was some contract under which the owner, if the voyage were not stopped by the perils insured against, would have been entitled to freight.' The owner had no charterparty or other contract for freight, but goods were on board sufficient to purchase the remainder of the homeward cargo, that were saved and afterwards bartered for goods, which would have completed the homeward cargo. It was decided that the assured should recover only the freight of the 55 bales of cotton.(1)

In a case precisely similar to the last, except that the owners had a charterparty for supplying a full cargo, only half of which had been actually taken in when the loss happened, the other half being ready to be put on board, it was decided that an insurable interest in the whole freight had accrued, and the assured recovered the amount at which it was valued.(2)

The Supreme Court in New York has recognized the principle which governed the preceding case, namely, that the owner of the ship having a charterparty, by which a freight is secured, has an insurable interest as soon as he has done something under the charterparty, and is ready to proceed in the execution of it on his part. The owner of the ship *Olive-Branch* let her by charterparty for a voyage from Bourdeaux to New York, Buenos Ayres, and back to Europe, for the entire sum of 18,000 dollars. The ship had arrived at New York in the prosecution of the voyage, where she was detained by an embargo, after her cargo had been discharged, and before the cargo for Buenos Ayres was put on board. Chief Justice Kent, giving the opinion of the court, said, 'the risk had attached on the whole freight. The charterparty gave an entirety to the contract of freight.'(3)

According to Lord Ellenborough's instruction to the jury, it will make no difference whether the agreement to supply a cargo or to pay freight, is in writing, or under seal, or only verbal. The freight of the ship *Jane* had been insured at and from the Cape de Verd Islands to London. She had taken on board 150 bags of orchella weed, which was only a part of a cargo, at St. Nicholas, where she was wrecked. No contract to supply the rest of the cargo was proved. The judge said, 'if a contract had been proved for supplying the ship with a full cargo at a stipulated rate of freight, it would have appeared that, by the event which has happened, the assureds had been deprived of a profit which they must otherwise certainly have received, and they would have a right to call upon the underwriters for a full indemnity. Nor should I have considered it material whether the contract were or were not under seal, or whether it was written or merely verbal. For ought that appears, the person

(1) *Forbes v. Aspinwall*, 13 East, 323. See also *Forbes v. Cowie*, 1 Camp. 520.

(2) *Davidson v. Willasey*, 1 M. & S. 313.

(3) *Livingston v. Col. Ins. Co.* 3 Johns. 49.

who was to supply the cargo might have refused to send on board another bag without subjecting himself to an action.' He was accordingly of opinion that an insurable interest in only the 150 bags on board had accrued at the time of the loss.(1)

(1) Patrick v. Eams, 3 Camp. 441. See also Moses v. Pratt, 4 Camp. 297.

Insurance being made on the freight of the ship *Etheta* from New York to Sisal, or some other port in the province of Yucatan and back, 'carried or not carried,' the ship, after taking in a part of her cargo at Silam, was driven on shore and lost. The rest of the cargo had been purchased and the export duty paid, and it was ready to be shipped, and would have been so, but for the unfavourable weather, when the ship was lost. The judges say, 'as the freight was valued at the sum insured, "carried or not carried," the assured is entitled to recover as for a total loss, notwithstanding a full cargo was not on board.'(2)

(2) De Longuemere v. The Phœnix Ins. Co. 10 Johns. 127; The same v. The N. York Fire Ins. Co. 10 Johns. 201.

By the preceding case it appears, that if the assured has done something towards earning the freight, and there is nothing to prevent earning it except the perils insured against, his interest in the whole freight has commenced. The judges distinguish this case from *Forbes v. Aspinwall* before cited, by the circumstance that the part of the cargo, not on board, was procured and ready to be put on board. They say this is precisely the case of *Montgomery v. Eggington* cited above. Mr. Justice Kent said, in another case, that an 'inchoate right to freight' constitutes an insurable interest.(3) According to what was said by Mr. Justice Eyre, 'if the goods be so situated as to create a well grounded expectation of freight being realized, freight is insurable.'(4)

(3) Davy v. Hallett, 3 Caines, 19.
(4) Curling v. Long, 1 B. & P. 636.
(5) Mestaer v. Gillipsie, 11 Ves. 629.

The interest of persons other than the owners, in freight.

The same question as to the commencement of the insurable interest occurs in respect to persons having an interest in the freight, other than the owners of the vessel;(5) and it is to be inquired besides what persons have such an interest. The charterer who agrees absolutely to pay a certain sum for the use of the ship during a certain time, or for a specified voyage, has an insurable interest in the freight. He alone is interested in the earnings of the vessel for the time agreed upon, since he agrees to pay the stipulated amount, whether the vessel earns freight or not. The charterer of a ship from the port of London to Russia and back, agreed that in case the discharging of the outward cargo, or the shipping of a return cargo, should not be permitted, he would pay the owner 2500*l.* on the return of the vessel to London. The court held that this agreement gave the charterer an insurable interest in the freight, to that amount.(6) The risk insured against, was that of the Russian government's not allowing the outward cargo to be discharged. The case does not therefore show that the charterer had an interest, that he might have insured against sea-risks; these still remained with the owner, and there seems to be no reason why he might not still protect his freight against these by a policy on his own account. The owner and charterer had therefore each of them an insurable interest in the freight, in respect to the risks to which they were severally liable. But if the charterer agrees absolutely to pay freight, he has an insurable interest in it in respect to all risks.(7)

(6) Puller v. Staniforth, 11 East, 232; Puller v. Halliday, 12 East, 494.

(7) Sanson v. Ball, 4 Dal. 459; Mackenzie v. Shedden, 2 Camp. 431.

If a person sells a ship, reserving the use of it for a certain voyage or time, he seems to stand precisely in the place of a charterer, and to have a similar insurable interest.⁽¹⁾

(1) *Riley v. Delafield*, 7 Johns. 522.

The freight of a part of a voyage may be insured. A ship sailed from St. Ubes for Gottenburg, but was to put into Portsmouth for convoy. The freight was insured from St. Ubes to Portsmouth. Lord Ellenborough said, 'there is no doubt that a party may insure his ship or goods for a part of a voyage; I cannot conceive why he may not insure freight in the same manner. There is no case which intimates the contrary, except *Murdock v. Potts*,⁽²⁾ which is inconsistent with all the other cases.'⁽³⁾

The freight of a part of a voyage may be insured.

(2) *Park*. 451.
(3) *Taylor v. Wilson*, 15 East, 324.

If the owner of the ship advances money for wages or charges, he has an insurable interest in consequence;^(a) and the same holds true of the charterer.⁽⁴⁾

Expenses incurred on account of the voyage may give an interest in freight.

It has been held that the advance of money by the charterer of the ship for the expenses of the vessel, constitutes no insurable interest in ship, cargo, or freight, nor, in respect to the risks of the voyage, in the money so advanced, unless the charterer is to lose the money advanced in case of the vessel's not earning freight, or in some other event. Bailey, J. said, 'if the charter-party had clearly expressed that the money advanced should be in part payment of freight, then the loss of the ship would produce to the freighter a loss of the money advanced, and he would have an insurable interest.' But if he still might recover the money of the owners, notwithstanding the loss of the vessel, he was held not to have an insurable interest.⁽⁵⁾ But if the freight when earned, was to be a fund out of which the freighter was to be repaid, and he had a control over that fund for the purpose, why had he not the same insurable interest in the freight, that a mortgagee has, or that a creditor has in the life of his debtor?

(4) *Sanson v. Ball*, 4 Dal. 459.

(5) *Mansfield v. Maitland*, 4 B. & A. 582. See also *Wilson v. Roy*, Ex. Ass. Co. 2 Camp. 626.

Section 12. *Interest in Fishing Voyages.*

In fishing voyages the insurable interest consists of the vessel, outfits, and fare, *catchings*, or *stock*. In whaling voyages the outfits are supplied wholly by the owners of the vessel. The men ship upon shares, or *lays*, each one being entitled to a certain proportion of the proceeds of the voyage. They accordingly have an insurable interest in the cargo as soon as it is on board. This interest is, however, rarely, if ever, insured by the men themselves, but sometimes is so by the assignees of the shares. The insurance is not that a cargo shall be obtained, which would in effect be a guaranty that wages should be realized, but it is upon the cargo obtained, and is therefore similar to an insurance of goods purchased by a mariner, or received by him as wages.

(a) *Salvador v. Hopkins*, 3 Burr. 1707; *Bell v. Bell*, 2 Camp. 475. Though *Siffken v. Allnutt*, 1 M. & S. 39, seems to be contrary; but the facts do not appear distinctly.

In cod-fishing voyages, as they are conducted in the United States, the outfits consist of the great and the small *general*. The *great general* is supplied wholly by the owners, and includes the salt for curing the fish, the bait, premium of insurance, and some other small articles and expenses. The *small general* is supplied by each man for himself, and consists mostly of the provisions and fuel. The insurable interest of the owners accordingly consists of their interest in the vessel, the *great general*, and their proportion of the fare, or *stock*, which is customarily one quarter, or, including the expense of curing the fish, three eighths.^(a) The interest of the men in the proceeds of these voyages is rarely insured.

Voyages in mackerel-fishing are conducted in a similar way, and the interests of the several parties are not unlike those in a cod-fishing voyage.

Section 13. Interest in Reinsurance.

Reinsurance is an illustration of the distinction between an insurable interest, and a property in the subject to which the insurance relates. An underwriter, by subscribing a policy, acquires no interest in the subject insured, yet he acquires an insurable interest, and having rendered himself directly liable to loss from certain perils, may stipulate to be indemnified against those perils. His interest, however, exists only in relation to the perils against which he has insured in the original policy. The English law forbids reinsurance, 'unless the insurer shall be insolvent, become bankrupt, or die';⁽¹⁾ and this statute is construed to extend to reinsurance of foreigners;⁽²⁾ but it is allowed in France, and is frequent in the United States.

(1) 19 Geo.

II. c. 37.

(2) *Andree*

v. Fletcher, 2

T. R. 161.

Upon the same principle, on which an insurer has an interest that may be the subject of reinsurance, it has been held that the owners of a vessel who were answerable for any loss by the fault of boatmen employed in bringing the cargo from the shore to the vessel, might insure the goods against that risk. This liability gave them an insurable interest in the goods, in respect to that risk.⁽³⁾

(3) *Walker v.*

Maidland, 5

B. & A. 171.

Section 14. Interest in Lives.

One who is directly liable to a loss by the death of any person, has an insurable interest in the life of such person. A credi-

(a) The owners usually supply the men with more or less of the *small general*, and as they depend wholly upon the proceeds of the voyage for payment, it is understood, by some persons conversant in this business, that they have an insurable interest to the amount of the *small general* supplied by them, though the price is in fact legally and absolutely due from the men: But it admits of some doubt whether they can insure except in behalf of the men.

tor has an insurable interest in the life of his debtor, as far as he is liable to any loss by his death. 'The policy,' says Lord Mansfield, 'may be considered a collateral security for the debt,'⁽¹⁾ and therefore depends upon the same principle as a policy upon the interest of a mortgagee. Lord Kenyon instructed the jury, in case of a debt due from Lord Newhaven to Anderson and Mitchell, and an agreement between Anderson and Mitchell, on a settlement of accounts, that the debt should 'remain to the account of Mitchell *only*,' that Anderson still had an insurable interest in the life of the debtor.⁽²⁾ But it does not appear what interest Anderson could have.

(1) *Stackpool v. Simond*, Park, 648; Marsh. 772.

(2) *Anderson v. Edie*, Marsh. 776; Park, 640.

This interest, like any other, must be a legal one; a note given for money won at play, gives no insurable interest in the life of the maker, the debt being illegal, and the note void.⁽³⁾

(3) *Dwyer v. Edie*, Marsh. 778; Park, 639.

Mr. Justice Buller intimated to the jury, that the holder of the note of an infant had an insurable interest in his life, for he might not avoid the note.⁽⁴⁾ In regard to this, as well as other subjects of insurance, an interest contingent in itself, and that might be defeated, or might not have been of any value to the assured, is still a good insurable interest. A young woman who 'was, and had been for several years, supported and educated at the expense of her brother, who stood towards her in *loco parentis*, was held to have an insurable interest in his life;' and Parker, C. J. in giving the opinion of the court, said, 'a policy effected by a child upon the life of a father, who depended on some fund, terminable by his death, to support the child, would never be questioned.'⁽⁵⁾

(4) *ib.*
(5) *Lord v. Dall*, 12 Mass. Rep. 115.

CHAPTER IV.

DESCRIPTION OF THE ASSURED.

IN many policies the assured is so described that any person may be comprehended, and avail himself of the contract, by proving his interest, and showing that the policy was intended for him. Different forms of expression are adopted for this purpose. In England, insurance appears to be made most frequently in the name of the broker, who causes himself to be insured on an interest, 'as well in his own name as in the name and names of all persons whatsoever to whom the same may in any way appertain.' The same form is often used in the United States, and also a shorter one of like import, in which the party effecting the policy, is insured for 'himself and whom it may concern.' At Marseilles the policy was formerly expressed to be made for 'such person as should be thereafter named.' At Hamburg the losses under a policy were made payable to 'the

(1) Ord. of
Hamb. tit. 1.
s. 4. 2 Mag.
211.

(2) 1 Emer.
47. c. 2. s. 4.

(3) Pray v.
Edie, 1 T. R.
314.

(4) c. 11. s. 4.

(5) Pray v.
Edie, 1 T. R.
313.

(6) 25 Geo.
III. c. 44; 1
B. & P. 352. n.

(7) Pray v.
Edie, 1 T. R.
313.

(8) Wilton v.
Reaston,
Park, 20.

(9) 28 Geo.
III. c. 56.

(10) De Vig-
nier v. Swan-
son, 1 B. & P.
346. n.;
Wolff v.
Horncastle, 1
B. & P. 316.

(11) Lucena
v. Craufurd, 3
B. & P. 75.

(12) Russell
v. N. E. M. Ins.
Co. 4 Mass.
Rep. 82.

bearer.'(1) Other general forms of expression of similar import, have been used at different places for the same purpose.

By these forms the assured might be concealed from the knowledge of the underwriter, and they were equivalent to the practice of subscribing policies in blank, as was formerly done at Marseilles,(2) and also in England.(3) The practice of insuring for whom it might concern was adopted, says Emerigon,(4) for the purpose of concealing the name of the party interested, and keeping his commercial enterprises secret. On this account the insurers in England complained, that 'policies were so loose that an underwriter had no opportunity of knowing the nature of the thing insured, or who the persons were for whom he insured.'(5) Accordingly a statute was made in 1785, prescribing the manner in which the assured should be described in the policy.(6) This statute was intended to secure to the underwriter a knowledge of the person with whom he was contracting. But soon after it went into operation, an underwriter took advantage of it to evade his contract, on the ground that the agent, in whose name the insurance had been effected, was not described as such in the policy. In that case, Lord Mansfield intimated a doubt of the expediency of the law.(7) Another policy was evaded under the same law, because it was made for 'W. Wilton, and 'the other owners;' they not being named.(8) Another statute was then made to remedy the mischiefs of the first, which required only the name of the person interested, or that of his agent, to be inserted.(9) As the agent needs not to be described as such under this statute, it does not secure to the underwriter a knowledge of the party actually interested.(10) This was in effect repealing the first statute, and no reason appears why it should not be repealed; since the inconvenience, if any existed, seemed to be very much within the power of the underwriters to remedy, without the aid of an act of parliament; if they wished to know what and for whom they insured, they might have refused to sign a policy in which the assured and the subject were not sufficiently described.

Such a restriction as the insurers seemed to desire, would be inconvenient in its operation, as abridgments of the liberty of contracting are apt to be, in general. Where an agent holds goods, of which he does not know the actual owner, as was the case with the commissioners of the Dutch prizes,(11) and where one agent consigns goods to another without advising the consignee that he holds them as agent;(12) the consignee may be able to give the underwriters information of all the facts material to the risk, yet if such a law were in force as that which the insurers desired before the statute 25 Geo. III. c. 44, he could not insure.

A policy in the name of a particular person with the clause, '*for whom it may concern,*' or other equivalent words, will be enforced to protect the interest of any person in whose behalf it was intended, and by whose authority it was effected.(a)

(a) The assured may be answerable over for the amount recovered on a policy made in his own name and for his own benefit; as in

It must appear that the policy was made in behalf of a person, for, otherwise, though he has an interest corresponding to that described in the policy, it will not be covered. Where the assured, supposing 3000 dollars to be shipped on his account in the West Indies, insured that sum in his own name, for whom it might concern, and it turned out that only the sum of 1152 dollars was shipped on his account, but another person, Bodwy, having money on board the vessel, wished to recover his loss under the same policy with the consent, no doubt, of the person in whose name it was made; Mr. Justice Washington was against his claim, on the ground that he neither procured the insurance himself, nor authorized any other person to do it.(1)

(1) *Bodwy v. Un. Ins. Co. Condry's Marshall*, 473. n.

A policy was effected on the schooner *Chance*, at and from Trinidad to New York, by Steinback, for account of himself, Milibran, Murray, or *whomever else it might concern*. The schooner was at the island of Trinidad, at the time mentioned in the policy, and cleared out there for New York, but actually sailed for Havana. She was owned by Milibran, who was at Trinidad at the time, and had nominally consigned the schooner and cargo to Steinback, at New York, at the time of actually sailing for Havana. Steinback had funds in the hands of Milibran, and being informed of the purchase of the schooner, supposed it might have been made with his funds and on his account. But Milibran had never given him any information to this effect, nor had he requested Steinback to effect insurance on account of any person. On the contrary, he had written to Havana for insurance on the voyage thither. In this case, therefore, Milibran, the owner, was named in the policy as one of the assured; the policy contained, besides, the general clause, *for whom it might concern*, and the vessel was at the place supposed in the policy, so that the risk at Trinidad might have attached within the terms of the contract; yet as it appeared that Steinback had no interest himself, and was not the agent of the owner to effect insurance, and that the policy was effected through mistake, the court held that the policy never attached, and decided that the premium should be returned. Three of the judges were of this opinion, but Kent J. dissented, on the ground that 'to permit Steinback now to deny that he was agent, in opposition to his own act and contract, would be opening a door to infinite fraud and abuse, and would be destructive to fair dealing, and to commercial confidence, and that the insurers ran a risk on the vessel; for if she had been lost at Trinidad, and before any orders to effect insurance for Havana, Milibran could have sued the underwriters, and they would have been left without defence.'(2) He does not say whether his opinion would have been the same if Milibran's name had not been in-

(2) *Steinback v. Rhinelander*, 3 Johns. Cas. 269.

the case of a creditor's insuring the life of his debtor to whom he charged the premium, where the executor of the debtor paid the debt; Lord Ellenborough instructed the jury that the creditor's executor should pay over to the executor of the debtor, the amount recovered under the policy. *Holland v. Smith*, 6 Esp. 11.

serted in the policy. It therefore does not appear whether he was of opinion that one who effects a policy for himself or 'whom it may concern,' is precluded from showing that he is not interested himself, and was not authorized to effect the policy as agent. His reasoning, however, seems to lead to the adoption of this principle, which would be attended with some inconvenience in preventing a return of premium.

It has not, however, been adjudged that the general description of '*whom it may concern*,' or other equivalent words, will preclude the party effecting the policy from claiming a return of premium for want of interest, though property may be at risk answering to the description in the policy. There are strong objections to establishing such a principle, since it would be a great discouragement to insuring in this form, which is very convenient in practice. 'What is an insurable interest is a question of some difficulty. Hence the advantage of a general form in naming the assured, and extending the effects of the insurance as far as the contract may be found to have been authorized by mercantile usages; thus comprising the cases of consignees, factors, trustees, and agents, and persons having a qualified interest in the property.'⁽¹⁾

(1) *Lee v. Mass. F. & M. Ins. Co.* 6 Mass. Rep. 208, per Sewall, J.

In the case of a policy upon a cargo in the name of Lawrence, 'and every other person to whom,' &c. it appeared that Lawrence owned one half of the cargo, the other half of which belonged to Thomas T. Gault. They were not general partners in trade. The vessel was captured and carried into Montserrat, where Lawrence's half was condemned, and that of Gault acquitted. The whole cargo was worth 10,000 dollars, the amount insured being 5000 dollars. If therefore the policy was to be considered as made for both of them, indemnity for only half of the loss could be recovered; but if for Lawrence alone, as he contended that it was, he would be entitled to a full indemnity. The court thought themselves at liberty to go out of the policy to ascertain on whose account it was made. Three of the judges were of opinion, from the facts proved, that the policy was intended by Lawrence to protect the joint interest, and that Gault could compel him to carry to their joint credit what should be recovered in the suit. Kent, C. J. and Thompson, J. dissented, on the ground that the insurance rather appeared from the policy itself to be made for Lawrence only, and that the underwriters so considered it.⁽²⁾

(2) *Lawrence v. Sebor*, 2 Caines, 203.

In an earlier case in the same court, on a policy effected by Lawrence and Whitney, 'as well in their own names, as for and in the name and names of all and every other person or persons,' on the cargo of the schooner Nymph, of which they owned a third part, the question was made, whether the insurance was on one third of the cargo or the whole. They claimed the benefit of the policy for themselves, to cover their part of the cargo, and Mr. Justice Radcliff said, 'it appears that the insurance was in fact so intended.'⁽³⁾

(3) *Lawrence v. Van Horne*, 1 Caines, 276.

Under a policy described to be 'for G. F. Straas and others, of Richmond, 'as well in his own name,' &c. it was decided

that persons residing out of Richmond might be included, and also that belligerents might be so, though persons residing at Richmond at the time were neutrals.(1)

From these cases it seems that a policy containing this general description may enure to the benefit of the person effecting it, or to that of any other person for whom he intends it, and who has requested him to effect it, or adopts it when made. The adoption of the policy by the party for whom it was intended before, and in many cases, at least, if not in all, even after a loss, is equivalent to his previous order for insurance.(2) And Emerigon is of opinion(3) that where the owner of property, in whose behalf insurance has been effected without his request, is informed of the insurance, and returns no answer, this is a sufficient ratification of the contract, to give the insurers a claim for the premium.

If a policy does not contain this general clause, no others than those named as the assured, or on whose account it is expressed to be made, can avail themselves of it. J. F. Dumas, 'by his agent Watkins, caused himself to be insured in the sum of 5000 dollars on the freight of the brigantine Rose,' which was the joint property of Dumas and J. W. Foussatt; but it does not appear that they were general partners. The freight was lost, and the assured claimed to recover the whole loss under this policy. But it was decided that he could recover only to the amount of his own interest.(4)

The same point had been previously decided in a case in which John Boonen Graves was insured in the sum of '10,000 dollars on property on board of the ship Northern Liberties, as property might appear,' without any other description of the assured. The cargo belonged equally to Graves and Barnewell, who were not general partners. It appeared that Graves intended to cover Barnewell's interest as well as his own; but Chief Justice Marshall, giving the opinion of the court, said, 'if such was to be the effect of the instrument, the contract ought to have been so expressed as to show that the interest of some other person than Graves was secured. The words *as property may appear*, seem to restrict the general terms of the policy to the interest of the person named in it.'(5) In giving the opinion of the court in Massachusetts on the same point, Mr. Justice Sewall said, 'no case can, I believe, be imagined, where the maxim *expressio unius est exclusio alterius*, applies more emphatically than in naming the assured in a policy of insurance.'(6) And where the policy was expressed to be 'for account of Mun-go Mackay,' Kent, J. said, it 'was equivalent to saying that the property was his.'(7)

Where John Murray and Sons owned two thirds of a cargo, and had advanced money on the other third, to be repaid out of the proceeds, which the owner of that third had directed to be remitted to London, and ordered his correspondent there to pass to the credit of Murray and Sons, a policy was effected by Murray and Sons, expressed to be for 'themselves,' without any general description to intimate that others were concerned, but

(1) *Hodgson v. Mar. Ins. Co.* 5 Cranch, 100.

(2) *Routh v. Thompson*, 13 East, 274; *Hagedorn v. Oliverson*, 2 M. & S. 485; *Steinback v. Rhinelander*, 3 Johns. Cas. 281, per Kent, C. J.

(3) *v. 1. p. 144. c. 5. s. 6.*

If there is no general clause the policy will be applied only to the interest of the party named.

(4) *Dumas v. Jones*, 4 Mass. Rep. 647.

(5) *Graves v. Bos. Mar. Ins. Co.* 2 Cranch, 419.

(6) *Pearson v. Lord*, 6 Mass. Rep. 81.

(7) *Kemble v. Rhinelander*, 3 Johns. Cas. 130.

Whether partnership property may be insured in the name of one partner.

(1) *Lawrence v. Sebor*, 2 Caines, 203. See also *Holmes v. Unit. Ins. Co.* 2 Johns. Cas. 329.

(2) 2 Cranch, 440.

The policy can be applied only to the interest for which it was intended.

(3) *Toppan v. Atkinson*, 2 Mass. Rep. 365.

intended by them to apply to the whole cargo; it was adjudged that only their own interest was insured.^(a)

Chief Justice Kent, however, says, 'there can be no doubt that a partner has such interest in the entirety of the cargo as to enable him separately to insure it, and that an averment that he had an interest in the property to the amount of the insurance, is supported by proof of a partnership interest to that amount.'⁽¹⁾ But he thought if the partnership was confined to a particular adventure, one partner could not insure the whole property in his own name. This distinction is difficult of application, since every partnership is more or less limited, and it would not be easy to say how general it must be, to give each partner an insurable interest in the partnership property to its full value. Chief Justice Marshall makes no such distinction; he says, 'under no rule of proceeding on a special contract, could the interest of a copartnership be given in evidence on an averment of individual interest, or the averment of the interest of a company be supported by a special contract relating in its terms to one individual.'⁽²⁾

A question has arisen in respect to the application of policies effected by persons, having an insurable interest in the subject, but of a description different from that which they intended to insure at the time of making the policy, where the policy would attach, if considered as applicable to one interest, but would fail in regard to the other. Amos Toppan of Newburyport, expecting that his correspondents, Winchester and Howard, of Fredericksburgh, would ship goods on his account, effected a policy on the cargo of the schooner *Charlotte*. The vessel had, in fact, sailed for Newburyport at the time the policy was made, having on board a cargo shipped by Winchester and Co. on their own account, consigned to Toppan, of which, however, he was not informed until after he had news of a loss. But with the information of the shipment he had orders to insure. Toppan was the general agent of Winchester and Co. and a balance was due to him as such. He therefore had an insurable interest in this cargo, after its being shipped and consigned to him, to the amount of his balance. Mr. Justice Sewall, giving the opinion of the court, said, 'goods the property of Toppan were expected, and these were insured. No goods of that description were shipped; and although goods of another description, the property of other persons, were shipped, and in which Toppan might have acquired a special interest and control; yet of these he had no knowledge, nor had he any intention to insure them, either for the shipper's or his own account.' And it was held that the policy did not attach.⁽³⁾

(a) *Murray v. Col. Ins. Co.* 11 Johns. 302. See also *Bell v. Ansley*, 16 East, 141; *Cohen v. Hannam*, 5 Taunt. 101. Some cases have been decided differently, which Mr. Park, 603. n. deems not to be law; they are *Hiscox v. Barrett*, before Lee, C. J. 1747, and cited 16 East, 145; *Perchard v. Whitmore*, 2 B. & P. 155. n. before Mr. Justice Buller, 1786.; *Carruthers v. Shedden*, 1 Marsh. Rep. 416, & 6 Taunt. 14.; *Page v. Fry*, 3 Esp. 185, 2 B. & P. 240, commented upon by Marshall, C. J. 2 Cranch, 440.

The same principle has been adopted in England. Goods had been shipped in the United States for Liverpool on account of the shippers. Advances were made by the consignees on account of the consignments, and they effected insurance at Liverpool, charging the shippers with the premiums, and intending to make the policies on their account, though this did not appear from the policies. The ship, with the goods on board, was detained by the American embargo of Dec. 1807, and the consignees claimed a loss. As they had an insurable interest themselves on account of their advances, if the policies were to be applied to *their* interest, there was no defence; but if the insurance was to be considered as made on behalf of the shippers, the court was of opinion that nothing could be recovered, because the loss was occasioned by an act of the American government, of which the shippers were subjects, and to the acts of which the court held them to be parties. Lord Ellenborough gave the opinion of the court, 'that where a policy is effected on behalf of the consignor, the consignee is not at liberty to apply it to his own interest.'⁽¹⁾

(1) *Conways v. Gray*, 10 East, 536; *Conway v. Forbes*, 10 East, 539. See also *Donath v. Jns. Co. of N. A.* 4 Dal. 463.

Insuring 'as agent' for a particular person, is equivalent to insuring 'on his account.' Israel Munson insured a vessel and cargo 'as agent of Samuel Russell,' without any general description of the assured. Russell had given Munson instructions to obtain insurance, but the property in fact belonged to Frederick Evarts. Chief Justice Parsons and the rest of the judges were of opinion, that 'from the import of the words of the policy, and from the necessary construction of it, no person was insured from loss but Russell;' and decided that Russell could recover nothing under the policy for the benefit of Evarts.⁽²⁾ A policy made by a person 'as agent for Holmes,' who was interested in a cargo owned by himself and four others not his partners, was held to apply only to Holmes's interest.⁽³⁾

Insuring as agent for a particular person.

(2) *Russell v. N. E. Mar. Ins. Co.* 4 Mass. Rep. 82.

(3) *Holmes v. Unit. Ins. Co.* 2 Johns. Cas. 329.

But if the nominal assured be described in the policy as agent generally, without saying for whom, it may be shown whose interest was intended to be insured, in the same manner as if the policy had contained the general clause 'for whom it may concern.' Where the assured were described in the following manner, 'Samuel Davis, or as agent, doth insure,' &c. on vessel and cargo, there were three owners, and the policy was intended to cover the interest of two of them. Jackson, J. giving the opinion of the court, said, 'this insurance was in truth made for the use and benefit of Davis and Richardson, and we see no difficulty in carrying that intention into effect. When the underwriter agreed to insure for Davis as agent, either he was informed that Richardson was the principal, or he waived all information on the subject.'⁽⁴⁾

Insuring as agent generally.

(4) *Davis v. Boardman*, 12 Mass. Rep. 80. See *Hibbert v. Martin*, 1 Camp. 538.

In case of there being different persons of the name under which the assured is described in the policy, it will of course be applied to the interest of the party for whom it was intended, and by whose order it was effected. Where the assured was described to be John B. Church, in a policy effected by him, but at the request and on account of John B. Church, jun. the contract was applied to the interest of the latter.⁽⁵⁾

(5) *Church v. Hubbard*, 2 Cranch, 196.

CHAPTER V.

DESCRIPTION OF THE SUBJECT.

Section 1. *What description is in general sufficient.*

(1) Langhorne v. Cologan, 4 Taunt. 330; Cheriot v. Barker, 2 Johns. 351.
 (2) Hunter v. Prinsep, Marsh. 316.
 (3) v. 1. p. 299, 300. c. 10. s. 3.
 (4) Lawrence v. Van Horne, 1 Caines, 276; Murray v. Col. Ins. Co. 11 Johns. 302; Rising v. Burnett, Marsh. 730; Lawrence v. Sebor, 2 Caines, 203; Toppan v. Atkinson, 2 Mass. Rep. 365; 1 Emer. 293. c. 10. s. 1.
 (5) Russel v. Un. In. Co. 4 Dal. 421.
 (6) Oliver v. Greene, 3 Mass. Rep. 133. See also Bartlett v. Walter, 13 Mass. Rep. 267.
 (7) Higginson v. Dall, 13 Mass. Rep. 101.
 (8) Williams v. Smith, 2 Caines, 19.
 (9) Kenny v. Clarkson, 1 Johns. 385.
 (10) Locke v. North Am. In. Co. 13 Mass. Rep. 61.

It is necessary that the thing insured, and in some cases also the kind of interest intended to be protected, should be sufficiently set forth in the policy, or that the policy should at least prescribe the way of ascertaining to what the contract is to be applied. As the contract will embrace no other subject than that described, its validity will depend upon the sufficiency of the description. (1) A policy on *hats* cannot be applied to *piece goods*; (2) nor one on *oil and barilla*, to *soap*; but Emerigon thinks a policy on *ingots of gold*, may be applied to *gold coins* and *utensils*, because they might be made into ingots without changing the substance. (3) This seems, however, to be a very refined and somewhat metaphysical reason.

In general a description of goods, freight, a ship, house, or other thing insured, by which it may be distinguished and identified, will be sufficient. If one own a half or any other proportion of a ship or quantity of goods, he may effect insurance generally without specifying his interest, and he will recover for such interest as he has. (4) And a mortgagee may insure in the same way, (5) and so may the charterer of a ship. William Oliver, being owner of one half of the schooner *Hiram*, chartered the other half, with an agreement to pay for it in case of loss. He insured the schooner generally, without specifying that he had an interest in one half of her as charterer only, and the policy was held to be valid. (6)

Chief Justice Parker says, 'whether a mortgager ought to insure his *interest only* in the ship, or may insure the ship itself, does not appear to have been definitely settled.' (7) But he seems to be of opinion that the mortgager may insure the *ship*, in the same manner as if he had made no conveyance. Thompson J. giving the opinion of the court in New York, seems to be of the same opinion. (8) And in another case in New York the vessel was insured by the mortgager or borrower on *bottomry*—it does not distinctly appear whether it was a mortgage or *bottomry*—and nothing was said in the policy about the particular interest intended to be covered. The policy was objected to on this ground, but the court did not regard the objection. (9) There seems to be no reason why the mortgager should describe his particular interest, since he has the same insurable interest as if the property was free of incumbrance. (10)

But a lender on *bottomry* or *respondentia* cannot insure the ship or goods effectually, unless his particular interest is describ-

ed.(1) Lord Mansfield said, 'he could not find even a *dictum* in any writer foreign or domestic, that the respondentia creditor may insure on goods, *as goods*, and that it was established now as the law and practice of merchants, that respondentia and bottomry must be specified in the policy.'(2) The reason given by Mr. Justice Kent, is, that the risk is peculiar, as 'there is neither average nor salvage, and a capture does not mean a temporary taking only, but one that occasions a total loss.'(3)

If captors having no grant from the government, but only a well grounded expectation of a grant of a part or the whole of the captured property, have any insurable interest, it has been implied that it cannot be protected by a policy made directly on the ship, freight, or cargo. Lord Ellenborough says, 'supposing such a chance insurable, must it not be insured specifically as such chance? Must not the interest be so described in the policy? Can a man who has no right, legal or equitable, either in ship or freight, effect an insurance on either, merely because he has a chance that some collateral benefit may arise to him if the ship and cargo should arrive in safety?'(4) But such a policy was held to be valid as applied to the interest of the government in the prize.(5)

'The cargo or freight of the ship *America*, both or either,' being insured, it was made a question whether the policy might be applied to cargo or freight, at the election of the assured, or must be applied to both in the proportion of his interest in the two subjects. Mr. Justice Sewall, giving the opinion of the court, said, 'To construe this insurance, at the election of the assured after the event, to be of freight only, exclusive of the cargo, would establish a very unequal contract between the parties. This construction is inadmissible, unless it be the unavoidable import of the words. The contract may be explained to be an insurance of freight, or of cargo, if in the event the assured should have only one of those descriptions of property at risk, and if he should have both, then it is an insurance upon both, proportionably to the interest of the assured.'(6)(a)

If the description designates the subject with sufficient certainty, or suggests the means of doing it, a mistake of the name of the ship or of other particulars, will not defeat the contract.(7) A policy being made, on 'the *Leopard*, or by whatever other name the same ship should be called, whereof was master for that voyage A. B. or whoever else should be master;' it appeared that the ship of which A. B. was master was the *Leonard*, and had never been called the *Leopard*. It was insisted in behalf of the underwriter, that the general words were meant only to embrace the case where the ship is called by the name in the policy and also by other names; but Chief Justice Lee was of a different opinion, and held the testimony of A. B. that he was master of the *Leonard* and never had been so of the

(1) *Williams v. Smith*, 2 Caines, 19; *Robertson v. Unit. Ins. Co.* 2 Johns. Cas. 250; *Jennings v. Penn. Ins. Co.* 4 Bin. 251.

(2) *Glover v. Black*, 3 Bur. 1394; 1 Bl. 396.

(3) *Robertson v. Unit. Ins. Co.* 2 Johns. Cas. 250.

(4) *Routh v. Thompson*, 11 East, 433.

(5) *Same v. Same*, 13 East, 274.

(6) *Faris v. Newburyport Ins. Co.* 3 Mass. Rep. 476.

(7) *Poth. h. t.* n. 105, and *Estrangin's note*; 1 Emer. 159. c. 6. s. 2.

(a) The case of *Amery v. Rodgers*, 1 Esp. 207, was cited by the judge, but it seems hardly to be an analogous case. See 1 Emer. 290. c. 10. s. 1.

(1) *Hall v. Molineux*, cited 6 East, 385.

(2) *Clapham v. Cologan*, 3 Camp. 382.

(3) *Le Mesurier v. Vaughan*, 6 East, 382.

(4) *Ruan v. Gardner*, *Condy's Marshall*, 316. n. See *De Symonds v. Shedden*, 2 B. & P. 153.

Leopard, to be sufficient to identify the vessel. (1) Another vessel bearing the Spanish name, *Tras Hermanas*, was described in the policy, by a translation of the name, as the *Three Sisters*, and this was held to be a good description. (2)

A policy being made on goods on board of the ship 'called the *American Ship President*, or by whatever other name the same ship should be called;' the goods were on board of the *President*; and it was urged that the admitting the sufficiency of this description, would expose underwriters to fraud. The court did not think the objection conclusive. Lord Ellenborough said, 'I do not see the mischief which may arise to the underwriter in this case. If there had been another ship with the same name as that mentioned in the policy, on board of which the plaintiffs had had goods, there might arise that inconvenience. But if the underwriters cannot be prejudiced by this mistake, the same reason does not apply.' (3)

A case somewhat analogous to these was one in which the goods were described in the policy as marked in a particular manner, and the marks were incorrectly described. It was mentioned to the broker who acted for the insurers, that it was doubtful whether the description of the marks was correct, but it was the intention to insure certain goods mentioned in a letter then shown. It was held, that as the identity of the property was clearly made out, and as no imposition could have taken place, the assured might recover. (4) There were no doubt other facts named in the policy besides the marks, to show to what goods it was intended to be applied, for otherwise the case would go the length of deciding that the contract may be applied to property different from that described in it, which would be a departure from well settled principles.

Section 2. Goods, Wares, Merchandise, &c.

(5) 1 Mag. 9. s. 14. *Wesk. tit. Goods*.

(6) 1 Mag. 9. n.

(7) 1 Mag. 10. s. 15.

Wesk. tit. Goods; 1

Em. 297. c.

10. s. 2;

Park, 26;

Marsh, 319.

(8) *Thomas v. Roy. Ex. Ass.*

Co. Man. Dig.

164. h. t. No.

5. Ed. 1820.

(9) *Duplanty v. Com. Ins.*

Co. Anthon's Cas. at N. P.

114.

The ordinances of some countries have provided that the general description, *goods, wares, and merchandise*, should not apply to perishable commodities unless they were particularly named; (5) but there seems to be no such distinction in England or the United States. Similar provisions have been made in some ordinances respecting the precious metals, coined or uncoined; (6) but they undoubtedly come within the general description, except in the case of clandestine trade; (7) and there seems to be no reason for this exception, since the fact that the trade is prohibited, appears to involve the question of concealment, or the legality of the contract, rather than that of the sufficiency of the description. Mr. Justice Dampier says, '*Goods, wares, and merchandise*, will cover dollars if entered at the custom house,' but not bank-notes. (8) Mr. Justice Spencer considered a curricule as coming within this description, and said, 'Here has been no concealment, the assured was not bound to specify the nature of the cargo.' (9) The same remark seems to be applicable to specie or bullion.

Jewels, rings, &c. not designed for trade, but belonging to the persons of those on board, have been said not to come under this description;(1) but there appears to be no reason why they should not, if the policy was so intended.

The interest of a respondentia creditor in the goods, was held to come within this description, under a usage of the East India trade in England.(2)

Lord Ellenborough says, 'Outfit cannot be considered as goods, in any proper sense of that word, that is, as part of the cargo.'(3)

Policies are sometimes made on goods 'by a ship or ships,' as thereafter to be declared, or on goods thereafter to be declared, which leaves it to the assured afterwards to determine the subject. But the voyage is described, and generally the time mentioned within which the ships are to sail. Respectable houses formerly kept large sums constantly insured in this way.(4) But there is some hazard of fraud upon insurers in these policies, as the assured may have a certain sum insured between particular ports, for a certain time, and within that time ship ten times the amount, and declare the policy to be on the shipment on which a loss may happen, when it cannot perhaps be proved what other shipments have been made. On the other hand this description may operate unfavourably to the assured, as he cannot easily prove that he had no goods at risk, in case he demands a return of premium. In this instance, as in many others, each party confides very much in the good faith of the other.

Notwithstanding the uncertainty of this mode of designating the subject, it has been said that the legality of it is too well established by usage and authority to be called in question.(5)

The assured may declare to what subject the policy is to be applied after a loss has taken place.(6) If he were required to declare before the loss, or lose the benefit of the policy, the contract would frequently be ineffectual, for it is adopted when no more particular description can be made, and it often happens that intelligence of a loss is received as early as the information by which the insured would be able to make a declaration of his interest. From the necessity of the case, therefore, he must be permitted to declare his interest after he receives news of a loss. It would however be a security to the underwriters in such a case, to insert a condition that the assured should declare his interest immediately after receiving intelligence which would enable him to do it.(7)

It has been held that where different shipments come within the description in the policy, the assured may apply it to either. Messrs. Kewley and Ryan, of Liverpool, had insured 1260*l.* on board of the Elizabeth, from the Island of Grenada to Liverpool, on account of Freeland and Rigby. They had orders to insure 1300*l.* more on account of the same persons, and not knowing by what ship the goods were to be sent, they insured 600*l.* in London, and 700*l.* in Liverpool, 'at and from Grenada to Liverpool, on any kind of goods as interest should appear, in ship or ships to sail before the first of August, 1793.' There was nothing in the policy to except the goods by the Elizabeth; and the under-

(1) *Roc. n.* 17.

(2) *Gregory v. Christie, Marsh. 319; Park, 14.*

(3) *Hill v. Patten, 8 East, 373.*

(4) *Wesk. tit. Ship or Ships, n. 10.*

(5) *Kewley v. Ryan, 2 H. Bl. 343.*

(6) *Harman v. Kingston, 3 Camp. 150.*

(7) See *Weskett*, p. 520, tit. *Ship or Ships*.

writers at Liverpool did not know that the insurance was not intended to cover those goods. The Elizabeth sailed in June and arrived safe. The Heart of Oak sailed afterwards, within the time mentioned in the policy, with goods of the assured on board to the amount of 1300*l.* and was lost. The underwriters in Liverpool refused to pay the loss, alleging that goods to the amount insured, and within the description in the policy, had arrived in the Elizabeth, and if damage had happened to them, the assured could have claimed a loss. But the court said, 'the assured had clearly a right to apply such an insurance to whatever ship he thought proper within the terms of it.'⁽¹⁾

(1) *Kewley v. Ryan*, 2 H. Bl. 343.

A case had been previously decided to the same effect. *Henchman* had been insured 6000*l.* on goods on board of any ship or ships that should sail from Bengal to England between Nov. 1779 and July, 1780. During that time he shipped goods to the amount of 4889*l.* on board of the *General Barker*, and 4500*l.* on board of the *Ganges*; and to cover the whole, had insured 4000*l.* in another policy. The *General Barker* was lost, and he claimed the whole loss under the policy for 6000*l.* He declared on oath before Judge Impey, previously to the loss, that he intended the policy of 6000*l.* for that shipment. The same objection was made by the underwriters as in the last case. But the court decided that he might apply the policy to that shipment.⁽²⁾

(2) *Henchman v. Offley*, 2 H. Bl. 345. n. See also 8 T. R. 15. n.

In another case, upon a policy 'on goods to be thereafter declared and valued,' in which the assured declared his interest to be on board of the *Tweende Venner* and *Neptunus*, and afterwards, finding he had made a mistake, and that he had no goods on board of either of those vessels, declared his interest to be on board of another vessel; Lord Ellenborough instructed the jury that 'the declaration of interest does not require any assent of the underwriters. The contract between the parties is complete when they have subscribed the policy. The declaration of interest is the mere exercise of power conferred upon the assured. It is generally put upon the policy for convenience, but this is not necessary, nor is there any necessity of its being in writing.'⁽³⁾

(3) *Robinson v. Touray*, 3 Camp. 158. See S. C. 1 M. & S. 217.

In these cases the goods coming within the description and not declared on, were insured in other policies; but where they are not insured in other policies, it should seem, from the reason of the thing, that the policy will be considered as applying to all the goods coming within the description, at least, unless the declaration of interest is made, so that the assured would be bound by it, before a loss is known. Where a policy was 'on goods from Marseilles to the West Indies and back, by the *Amphitrite* and other vessel or vessels;' the assured had goods on board of different vessels to a greater amount than was insured, and those shipped first, to the amount insured, arrived safe, and a loss occurred on those subsequently shipped. It was held that the policy should apply proportionably to all the goods coming within the description.⁽⁴⁾ The policy in this case does not seem to have contained any provision for a declaration of interest, but

(4) 1 Emer. 174. c. 6. s. 5.

it would be giving an extraordinary effect to that provision, to hold that it gives the assured the right of choosing to which, out of a number of vessels, the policy shall apply, after the event is known. But as no particular form of declaration is requisite, the conduct of the assured in making other insurance specifically on a part of the property within the terms of the policy, as was done in the above cases, seems to be equivalent to a declaration of his interest.

Where the policy contained a provision, that 'the risk was to attach to the proceeds in the return cargo,' the outward bound cargo was not sold, but the consignees purchased and shipped a return cargo, intending to reimburse themselves by the sale of the cargo consigned to them. A loss occurring, the underwriter objected that the return cargo was not the *proceeds* of that carried out. But the court held otherwise, on the ground that a return cargo purchased on the credit of that exported, was the proceeds of it, within the meaning of the policy.(1)

Valin says if the goods described in the policy are exchanged at any port in the course of the specified voyage, the policy will apply to the substituted goods without any express provision for this purpose, where the insurance is to several ports, which seems to imply the liberty of exchanging the goods.(2)

An insurance on all *lawful* goods has been held to apply to contraband goods as well as others. Mr. Justice Kent said, 'I am of opinion that contraband goods are lawful goods; and that whatever is not prohibited to be exported by the positive law of the country is lawful. The law of nations does not declare the contraband trade to be unlawful. It only authorizes the seizure of the contraband articles by the belligerent powers.'(3)

A coach-plate maker and cow-keeper was insured on 'his stock in trade, household furniture, *linen*, wearing apparel, and plate.' His house was burned, and with it a large quantity of linen drapery goods, purchased just before on speculation; and a question arose whether the linen drapery was comprehended in the description. Lord Ellenborough said to the jury, 'I am clearly of opinion that the word *linen* in the policy does not include articles of this description. Here we may apply *noscitur a sociis*; the preceding words are "household furniture," and the succeeding, "wearing apparel;" the linen must be household linen or wearing apparel.'(4)

Insurance is sometimes made on goods 'from the time of loading them on board,' specifying at the same time at what port the risk is to commence. And in case the goods are not laden on board at the port where, according to the policy, the risk is to commence, there often arises a question whether the policy attaches. It has been decided in a number of cases that the policy did not attach, and in those decisions three different grounds seem to be assumed; one, that it is a condition, in the nature of a warranty, that the goods shall be loaded on board at the place where the risk is to commence; another, that the loading the goods on board at such place is the only event from which to date the commencement of the risk, and this not hav-

(1) *Haven v. Gray*, 12 Mass. Rep. 71.

(2) v. 2. p. 78. h. t. a. 27.

(3) *Seton v. Low*, 1 Johns. Cas. 1. See also *Skidmore v. Deadon*, 2 Johns. Cas. 77; *Juhel v. Rhineland*, 2 Johns. Cas. 120, & 487.

(4) *Watchorn v. Langford*, 3 Camp. 422.

ing happened, it does not commence; and a third, that the goods do not answer to the description in the policy. The grounds of warranty and the want of commencement of the risk, have been most distinctly alleged in support of these opinions.

A policy was effected on goods by the Brunswick, 'beginning the adventure upon the said goods and merchandizes from the loading thereof on board the said ship at China, to all ports and places whatsoever.' The goods were taken on board at Canton for Europe, whither they were insured, and the vessel put into Bombay, where the goods were trans-shipped, and a cargo of cotton was taken on board the Brunswick for Canton, on account of the assured, which was lost by capture on the voyage. The assured claimed this loss of the underwriters, but the court held that the policy did not apply to this cargo.⁽¹⁾ And it was held in New York, under a policy 'upon all goods laden on board the Rolla, beginning the adventure from the loading thereof on board the said vessel at Cagliari,' that 'the hoisting the cargo out of the hold and restowing it at Cagliari, did not amount to loading it on board at that place.'⁽²⁾

(1) Grant v. Paxton, 1 Taunt. 463.

(2) Murray v. Col. Ins. Co. 11 Johns. 302. But see the cases on this subject under Warranty and Risks.

(3) Lucena v. Craufurd, 2 N. R. 315.

(4) Mumford v. Hallett, 1 Johns. 433.

(5) Eyre v. Glover, 16 East, 218.

(6) Prichet v. Ins. Co. of N. A. 3 Yeates, 461.

Section 3. Profits and Commissions.

In regard to a description of profits, it was held by all the judges of England,⁽³⁾ that a policy described to be upon a ship or goods, could not be applied to profits. It has however been decided in New York, that an insurance '*at and from Cumana to New York, in and with the schooner Rising Sun, on profits* on all goods laden and to be laden, &c. which goods are valued at 2500 dollars,'—the words in italics being written,—was a policy on profits, though the valuation seems to refer more directly to the goods.⁽⁴⁾ But the written part of the policy controls the printed, and here the insurance appeared, by the written part, to be upon profits.

A policy 'upon goods, and also upon the body of the ship Elizabeth, the said ship, goods, and merchandizes, for so much as concerns the assured, by agreement between the assured and assurers are, and shall be *on profits*,—the words in italics being written, and the rest of the description printed—was decided to be a policy on profits. And Lord Ellenborough said, 'are profits any thing more than an excrescence upon the value of the goods beyond the prime cost?'⁽⁵⁾ It is said in one case to be the practice in Philadelphia to insure profits under the denomination of 'goods.'⁽⁶⁾

When the insurance is intended to be on profits or commissions, it is generally so described by using those words; but this does not seem to be absolutely necessary. An insurance was made 'on property in the brig Lavinia.' It was intended to cover the interest of Holbrook, the master, who was to receive a commission of seven and a half per cent. on the cargo on its arrival in America. A loss happened on the homeward voyage. The court said, 'this word *property* is very comprehensive, and there

can be no doubt that it was the intention of the parties to cover this interest of the master, whether it was to be considered as commissions, or as a specific proportion of the cargo belonging to him. The earnings of the master were completed; when the homeward cargo was laden on board he was entitled to his seven and a half per cent.' And judgment was given for the assured.(1)

Section 4. The Ship.

By some cases it appears that an insurance of the ship *only*, covers the hull, sails, tackle, boat, armament, ammunition, and provisions; in others, it seems at first view, that a narrower construction is to be put upon such a description. Mr. Justice Buller, speaking of a policy on *the ship*, said, 'the provisions are no part of the thing insured,'(2) and the expressions used by him in another case are of the same import;(3) but his language ought to be considered with reference to the particular subject under consideration, which was a loss by the consumption of provisions during a detention of the vessel, and the question was whether it should be paid by the insurers on the vessel. Though the provisions were covered by a policy on *the ship*, it would not follow that the insurers would be liable for such a loss. Accordingly a decision that they were not liable, does not establish that provisions are not comprehended in an insurance of the ship.

It has been decided many times that the insurers are not liable for provisions consumed during the detention of the ship, but it has been very distinctly decided also, that a policy on the ship covers the provisions and other subjects above mentioned. Lord Mansfield said, 'in a policy on a *ship* the insurance is on the body of the ship, *tackle* and *furniture*;'(4) and Lord Ellenborough, 'the hull and *outfits* are both protected by insurance on *the ship*.'(5) Weskett says, the *outfits* comprehend sails, cordage, provisions, armament, and ammunition.(6) In Lord Kenyon's time the assured in a policy on the ship and *furniture*, recovered for a loss of the tackle and provisions.(7) Lord Ellenborough said, 'as far as the outfit consists of provisions put on board for the use of the crew, they are covered by an insurance on the *ship*, being in fact part of the necessary furniture, stores, and equipment of every ship proceeding on a voyage.'(8) Emerigon says, that the rigging and *boat* are covered by a policy on the ship.(9) In the United States a similar construction is adopted; a policy on the ship is understood to extend to the sails, rigging, tackle, furniture, boat, and provisions.

Where the policy was on the 'ship, tackle, and furniture,' for a voyage in the Greenland fishery, the whole court held that the *lines* and *fishing tackle* were not comprehended in this description.(10) They are generally insured under the name of *outfit*, 'which, in a fishing voyage, principally consists in the apparatus and instruments necessary for the taking of fish, seals, &c. and

(1) Holbrook v. Brown, 2 Mass. Rep. 280.

(2) 1 T. R. 127.

(3) 1 T. R. 132. n.

(4) Robertson v. Ewer, 1 T. R. 127.

(5) Forbes v. Aspinwall, 13 East, 325.

(6) tit. Outfit p. 382. See also p. 433, tit. Provisions.

(7) Brough v. Whitmore, 4 T. R. 208.

(8) Hill v. Patten, 8 East, 373.

(9) v. 1. p. 179. c. 4. s. 7.

(10) Hoskins v. Pickersgill, Park, 97; 1 Marsh. 127.

(1) Hill v.
Patten, 8
East, 373.

the disposing of them when taken, in such a manner as to bring home the oil or other produce of the adventure.'(1) In the United States the different interests in fishing voyages are universally described as consisting of the ship, the outfits, and the cargo.

Section 5. Freight.

(2) Bell v.
Bell, 2
Camp. 475.

Freight being insured 'at and from Riga in continuation' of a former policy on freight 'to the Baltic,' &c. the ship was seized at Riga before the outward cargo was discharged, and accordingly the freight outward was lost. Lord Ellenborough held that the description did not apply to the freight lost, but to that of the return cargo.(2)

3) Murdock
v. Potts, Park,
451; Marsh.
326.

The question has occurred whether the freight of a part of a voyage can be insured, without expressing in the policy that it is freight of only a part of the voyage. Where an insurance was made 'on freight of the ship Bethiah, at and from Bourdeaux to Virginia,' and the goods were to be carried in the ship from Bourdeaux to St. Domingo, by the way of Norfolk in Virginia, Lord Kenyon instructed the jury that the underwriters had a right to expect that the goods upon which the freight was payable, were consigned to Virginia, and that the freight payable, namely, that from Bourdeaux to St. Domingo, being different from the freight described in the policy, the assured was not entitled to recover any thing.(3) But what importance could it be to the insurers to be informed, to what place the goods were to be carried from Norfolk, or in what ship? Lord Ellenborough said, this opinion 'was inconsistent with all other cases,' and accordingly, upon a policy on freight 'from St. Ubes to Portsmouth,' the vessel having taken a cargo at St. Ubes for Gothenburg, with the intention of putting into Portsmouth on the voyage, Lord Ellenborough said, 'the only question is, whether the freight of a voyage may be insured a part of the way. This was a voyage to Gothenburg by the way of Portsmouth, and the freight was to be earned at Gothenburg. The assureds did not deceive the underwriter when they insured their freight to Portsmouth; they did not tell him that the freight was to be earned there, but only that it was an insurance on freight in that voyage.' And Bailey, J. said, 'it does not vary the risk that the assured did not disclose to the underwriters that the ship was to proceed further on a voyage to Gothenburg; for I cannot see what advantage it could have been to them to be informed, that the freight insured would not be earned till the ship arrived at Gothenburg, or what disadvantage it was not to receive such information.'(4) And judgment was given for the assured.

4) Taylor v.
Wilson, 15
East, 324.

It has been held in New York that where the assured has an interest in the freight by a particular agreement, and not as owner of the vessel, he cannot insure freight generally, but must describe the particular interest. The insurance was, 'at and from New York to the port of discharge in the Mediterranean, upon

the freight of goods laden or to be laden on board the brig *Delia*.' The assured had sold the vessel with the reservation of the right to receive the freight for the voyage insured, which seems to make his interest precisely that of a charterer who agrees to pay the charter money at all events. The court said, 'All the interest of the assured was founded on this special agreement, and it could not strictly be denominated freight, since it was not an interest accruing to the assured as owner of the vessel for the use of her. It could not be insured as freight *eo nomine*, unless accompanied with a disclosure of the peculiar nature of the interest. It would otherwise be an imposition upon the insurer, who when he is asked to insure freight, must presume that he is dealing with the owner of the vessel. The owner has a stronger interest in the management and equipment of the vessel, than a stranger having no such stake in the voyage. And to allow such an interest to be covered under the name of freight, without explanation, would lead to abuse and fraud, by affording an opportunity to cumulative insurances upon the same interest, and interested combinations to destroy it.'⁽¹⁾

The grounds of this decision do not appear to be very satisfactory. The court says, the interest of the assured was not strictly that of freight, which is defined to be the price of transportation paid by the owner of the goods to the owner of the vessel. But was not the assured the owner of the vessel *pro hac vice*? Suppose the vessel had been chartered for a long time and employed as a general freighting vessel, would not the price due to the charterer from the shippers be freight? If there be any distinction it is merely verbal, but there does not seem to be even this distinction. Freight is the name by which this interest is insured and commonly known, and it seems therefore to be the proper meaning of the word in a policy; if a definition does not comprehend this meaning of the term, it rather proves the defect of the definition than any thing else. In regard to the danger of frauds by the insurance of the same freight in the names of divers persons, the assured must prove his interest before he can recover for a loss, and different persons could as easily prove themselves the sole owners each of a vessel as of the freight. As to the owner's having a stronger interest in the preservation of the vessel; it depends on the fact, whether he has insured at an over-valuation. But somebody is owner and has this interest, of which the insurers have the advantage; besides, the assured himself has the same interest, unless he has overvalued the freight, and there seems to be no reason for assuming, as a general proposition, that persons to whom the freight belongs, whether owners of the vessel or not, have a greater interest in the loss of the subject, than the assured in general have in regard to other subjects. This case is opposed in principle to a number of others above cited, in which it was held that the charterer might insure freight generally, and here the assured was to all intents and purposes the charterer.⁽²⁾ The rule adopted by the court in New York seems more likely to defeat fair contracts, than to prevent fraudulent ones.

(1) *Riley v. DeLafield*, 7 Johns. 522.

(2) *Oliver v. Greene*, 3 Mass. Rep. 133; *Locke v. N. A. Ins. Co.*, 13 Mass. Rep. 61; *Bartlett v. Walter*, 13 Mass. Rep. 267.

Upon the same notion that freight is the price paid for the transportation of goods, it was objected on the part of the insurers in a policy 'on the freight of the brigantine Rose,' that the description did not sufficiently designate the interest, because the assured was owner of both ship and cargo, and so no freight was to be *paid*. But the court said that, in such case, 'the profits of the voyage might be insured under the denomination of freight.'⁽¹⁾

- (1) *Dumas v. Jones*, 4 Mass. Rep. 647.
See also *Hart v. Del. Ins. Co. Condy's Marsh.* 281. n.
(2) *Barclay v. Stirling* 5 M. & S. 6.
(3) *Sanson v. Ball*, 4 Dal. 459.

Insurance being made upon freight 'from Jamaica to the United Kingdom, with leave to call at any of the West India Islands to take on board goods,' the description was held to apply to the freight of goods taken on board at Havana.⁽²⁾

It has been held in Pennsylvania that the description of 'freight advanced,' applied to the interest of a charterer of a part of the ship, who was to pay the charter money at all events.⁽³⁾ It was so held in New York also; where it was decided at the same time, that the owner of goods who had advanced the freight or a part of it, with an understanding that it was not to be refunded in any event, could not insure the money so advanced under the description of 'freight.'⁽⁴⁾ It was adding so much to the cost and charges of the goods.

- (4) *Cheriot v. Barker*, 2 Johns. 346.

Section 6. Reinsurance.

In reinsurance the same general rules apply as to the description of the subject, namely, the former policy subscribed by the assured; and if this be not sufficiently described the reinsurance will fail. James Prince having underwritten one policy on the *Columbia and cargo*, another on *property* on board of the *Columbia*, and another on *effects*, on board of the same vessel, was re-insured on 'the *Columbia and cargo*,' with a provision that the reinsurers should indemnify him against all losses on the same amount underwritten by him on a former 'policy.' It was held that the reinsurance extended to but one of the original policies, which was the policy on the 'Columbia and cargo,' as only this one answered to the description in the policy of reinsurance.⁽⁵⁾ Christian says, 'a reinsurance must be expressly mentioned to be a reinsurance, in the policy.'⁽⁶⁾ But the case cited by him⁽⁷⁾ does not appear particularly to support the proposition; which nevertheless may be true, as it does not seem to be easy to describe this interest without showing the policy to be a reinsurance.

- (5) *Merry v. Prince*, 2 Mass. Rep. 176.
(6) Note 2 Bl. Com. 460.
(7) *Andree v. Fletcher*, 2 T. R. 161.

CHAPTER VI.

THE PREMIUM.

THE contract of insurance must include a stipulation for the premium, the rate per cent of which is always expressed in the policy. But as the underwriter is liable to loss and entitled to a premium, only as far as the property is at risk, it does not necessarily appear by the policy what amount will be actually and effectually insured, and accordingly it does not show what amount of premium will be eventually earned. The amount intended to be insured appears in some cases, by the policy itself, to be uncertain, as in a policy 'on money advanced or to be advanced, for the use of a ship,' during an India voyage.(1)

The premium must be agreed upon.

Insurance was made on a cargo to 'be valued as interest should appear,' at the rate of premium of 15 per cent for six months; and the value of the cargo at risk during that time, varied from 1500 to more than 5000 dollars. It was held, on the ground of a usage to that effect in Philadelphia, that the premium was to be estimated at that rate on the value on board at successive periods, and for the time during which it remained on board.(2)

(1) 3 Burr. 1712.

(2) Pollock v. Donaldson, 3 Dal. 510.

Generally, however, the premium on the whole sum named in the policy as insured, is considered in practice to be due immediately, though in the United States it is not usually payable until after the expiration of a credit of from two or three, to eighteen months or more, according to the length of the voyage.

The premium is due immediately, but, in the U. S. is not immediately payable.

It appears that in England the premium is payable on demand; but where the policy is subscribed by individual underwriters, the broker generally keeps a running account with them, and gives them credit for the premiums received or due from the assured, out of which he pays such losses as accrue on policies put into his hands by the assured to be settled. He has a similar running account with the assured, whom he charges with the premiums, and credits with losses. He settles with each at stated periods or otherwise, according to the custom of the place, or the particular agreement of the parties.

The practice is much the same in the United States in respect to policies effected through the agency of brokers. But these policies constitute only a small part of the business of insurance, a greater part of which is done by incorporated companies that do not employ brokers. Where the contract is made through a broker, the premium note is generally made payable to him or his order, and not to the underwriters. In the case of insurance by an incorporated company, the premium note is generally made payable to the company by its corporate name, or to some of its officers. Accordingly the broker in one case, and the company or its officers in the other, may negotiate the note immediately, and compel the assured to pay it at its maturity, with-

out any deduction for a loss or return of premium that may accrue before the period of credit expires. But these notes are rarely negotiated, and as the term of credit exceeds the usual length of the voyage, it is commonly known before the premium note is payable, whether any claim has accrued for a loss or return of premium, and only the excess of the demand of either party over that of the other is actually paid.

Both in England and the United States in the case of policies effected by the agency of brokers, the parties, in respect to the premium, are usually the assured and the broker. In respect to the policy and to all claims for return of premium and for losses, the parties are the assured and the underwriter.

Construction
of the receipt
for the pre-
mium.

The usual form of the policy contains a clause by which the insurers confess themselves to have been paid the premium. Where a negotiable note is given for the premium, this is a sufficient payment to be the ground of such a receipt. In England, where such a note does not appear to be usually given, questions have arisen respecting the intention and effect of this acknowledgment. The intention of the parties in inserting the acknowledgment appears to be plain enough from its import, and not to require explanation, any more than a receipt for money paid in other cases.

(1) p. 335.

But as the premium is not always paid at the time of subscribing, some reason has been sought after for inserting an acknowledgment in those instances. Mr. Marshall(1) says, 'an action will lie for the premium notwithstanding this formal acknowledgment of the receipt of it in the policy, which is not inserted there as conclusive evidence of the actual payment, but to preclude the necessity of proving it in case of loss.' The same reason is given by Mr. Campbell.(a) But it implies that if this acknowledgment were not inserted in the policy, the assured would be obliged to prove that the premium had been paid, before he could recover for a loss. It does not appear, however, why the acknowledgment must be inserted for this purpose, since a consideration for the undertaking on the part of the insurer is shown as much by a promise of the assured by which he is bound to pay, as by a payment.

It seems to be a sufficient reason for inserting this acknowledgment, that a written contract, whether of insurance or of any other sort, ought to contain all the terms agreed upon, and the considerations that pass between the parties. In acknowledging the receipt of the premium, the parties adopt the form used in deeds of conveyance of land, which contain the same acknowledgment, though in the greater number of instances the payment is not in fact made at the time of the conveyance. The same form is used in other instruments. It is not at all remarkable that the receipt of the premium should be acknowledged in England, where it is paid at the time of subscribing the po-

(a) 1 Camp. 534. n. Mr. Park cites this note of Campbell in his Edition of 1817, p. 34, and calls it a 'sensible and acute observation of the reporter,' but it was the observation of Mr. Marshall.

licy, or is a debt due from the assured to the broker, who, instead of the assured, becomes the debtor of the insurer; or in the United States, where it is paid, or the assured makes a promise in writing to pay it. If an underwriter in the United States acknowledges a receipt of the premium, without receiving a note, or in England, without the intervention of a broker, he subscribes an instrument in a form adapted to the general practice, when he himself departs from that practice. According to the general practice the acknowledgment is substantially true.

In regard to the effect of the acknowledgment, it was formerly made a question whether the underwriter could, notwithstanding it, maintain an action against the assured for the premium.⁽¹⁾ It was supposed that such an action might be maintained, which led to the above ingenious construction, as Mr. Park considers it, of the acknowledgment. There are a few cases in which the underwriter has recovered the premium of the assured, where, if he had not, an effect would have been given to fraudulent and unfair dealing. Foy, of Pillau, promised a consignment of goods to Gordon, of London, a young man just beginning business, who obtained insurance on the goods upon the credit of this promise, the insurers supposing he would thus be supplied with funds out of the proceeds of the goods to pay the premium. Foy consigned the goods to another merchant, and a loss happening, and a claim for return of premium accruing, the insurer claimed the right to set off the premium. The court allowed the set-off with harsh expressions respecting the conduct of Foy.⁽²⁾ In another case, Haynes, an insurance broker, being indebted to Simeon and not able to pay him, Simeon proposed that Haynes should procure insurance for him until the premiums should amount to his debt. Thus Haynes would be left indebted to the insurers for the premiums, and Simeon's debt be discharged. The insurances were accordingly effected. But the insurers, learning the purpose of the broker and the assured, brought suits against Simeon for the premiums. The jury, however, being of opinion that the broker alone was debtor for these, found in favour of the assured. But the court was dissatisfied with their verdict, and would have granted a new trial had not the matter been settled by the parties.⁽³⁾

(1) Park, 35; Marsh. 335.

(2) Foy v. Bell, 3 Taunt. 493.

(3) Mavor v. Simeon, 3 Taunt. 497. n.

But where there is no such reason for controlling the effect of the acknowledgment, the insurer has been held to be estopped by it from demanding the premium of the assured, and from denying, as between himself and the assured, that he had received it. An action being brought by the assured for a return of premium, the underwriter offered to prove, notwithstanding his acknowledgment in the policy of the receipt of the premium, that he had never received it. Lord Ellenborough instructed the jury, that 'the insurer was bound by the receipt in the policy. If a man acknowledge that he has received a sum of money of a broker, and credits him with his principal to that amount, he shall not afterwards, as between himself and the principal, be allowed to say that the broker never paid him.

I should completely knock up the insurance business if I were to allow this acknowledgment to be impeached.'⁽¹⁾

(1) Dalzell v. Muir, 1 Camp. 532.

Again, the same decision was given by the whole court in a case in which Lord Ellenborough said, 'In the usual course of things the underwriter acknowledges, upon the face of the policy, the receipt of the premium, which is an admission that he has received it through the intervention of the broker, and has no claim against the assured. His claim is against the broker.'⁽²⁾

(2) Cumming v. Forrester, M. & S. 499.

These cases establish the principle, that in England, at least, where a policy is effected through the intervention of a broker, the acknowledgment precludes the underwriter from afterwards demanding the premium of the assured. But how far this principle is the effect of the acknowledgment in the policy, or the general course of business, is a matter of some doubt.

(3) c. 8. s. 2. p. 35.

(4) Fowk v. Pensack, 2 Lev. 153.

(5) Jackson v. Colegrave, Carth. 338.

(6) Pinsacks & Fowks, 3 Keb. 575.

(7) Grove v. Dubois, 1 T. R. 112.

(8) Airy v. Bland, Park, 36. Marsh. 294.

In 1802, Mr. Marshall expressed some doubt whether the premium was the debt of the broker, being of opinion at the same time, that 'it would be for the interest of all parties that the rule that the broker alone could maintain an action against the assured for premiums, should be fully established and constantly adhered to.'⁽³⁾ An old case,⁽⁴⁾ and a *dictum* of the judges in another,⁽⁵⁾ are cited; which however seem to be of very little weight, as it does not appear that the policies referred to contained the acknowledgment, but rather that they did not, for Wild, J. said, 'the insurer only subscribes 100*l.* not the premium, which is never expressed in the printed policy.'⁽⁶⁾ In Lord Mansfield's time an action was commenced on the part of the underwriter, against the broker, for premiums on policies made in the broker's name on behalf of his foreign correspondents, and no question was made whether the broker was debtor for the premiums.⁽⁷⁾ It is stated by a witness in another case to have been the general practice in London as early as 1764, for underwriters to look to the brokers only for premiums.⁽⁸⁾ And in many subsequent cases this is directly decided, or obviously recognized to be law, without any express distinction between policies in the name of the broker, and those in the names of his employers.^(a)

These decisions have, however, in some measure grown out of the usage of London, and the usage is distinctly referred to by judges in giving their opinions. As far as the opinions are founded upon such a usage, they are not applicable in the United States, where the premium is not understood to be a debt from the assured to the broker, which the broker could demand in his own name, unless it is made so by a special agreement, or understanding, between the parties. An insurance broker is not distinguished in this particular from any other agent. Where the

(a) Bize v. Dickason, 1 T. R. 285; Edgar v. Fowler, 3 East, 222; Edgar v. Bumstead, 1 Camp. 411; De Gaminde v. Pigou, 4 Taunt. 246; Parker v. Smith, 16 East, 382; Minott v. Forrester, 4 Taunt. 541; Cumming v. Forrester, 1 M. & S. 494; Koster v. Eason, 2 M. & S. 112; Parker v. Beasley, 2 M. & S. 423; Houstoun v. Robertson, 2 Marsh. Rep. 138; 6 Taunt. 448; 1 Holt, 88.

assured at the time of effecting the policy, requested the broker to charge him in account with the premium, Sewall, J. giving the opinion of the court, said, 'there can be no reason against the action in the name of the broker, where a note has been given to him, or he has become a creditor of the assured at his request.'(1)

In the United States the acknowledgment cannot in general receive the construction put upon it in England, in case of the premium not being paid at the time of making the policy, namely, that the underwriter must look to the broker and not to the assured. Yet it can hardly be doubted that this receipt would be held to be evidence of payment between the parties to the policy, for to hold otherwise would be to give this acknowledgment no effect, and put the parties in the same situation that they would be in, if no such acknowledgment were contained in the policy.

The acknowledgment was held, in the circuit court of the United States for Pennsylvania, not to be sufficient evidence that the agent, who effected the policy, had paid the premium, so as to enable him to recover it of his principal, without other evidence.(2)

Where the policy is void without the fault of the assured, or by its illegality, and also where the risk does not attach, no premium can be recovered. And a negotiable note being given for the premium of an illegal insurance, and made payable to the broker or his order, cannot be recovered by the broker.(3)

A risk incurred, being requisite to make a premium due, it is in the power of the assured by putting none, or only a part, of the property, at risk within the terms of the policy, to annul the contract in whole or in part. This is an indulgence allowed by the law to this species of contract, and is considered to be an implied condition upon which it is entered into, because it is often impossible, at the time of effecting the policy, for the assured to know whether any or what part of the property insured will be at risk; and it would be a hardship, and a great discouragement to insurance, if the assured were obliged to pay the premium where no risk is run by the insurer, merely because he is ready to run the risk.

(1) *Taylor v. Lowell*, 3 Mass. Rep. 352.

(2) *Melick v. Peterson*, Condry's Marsh. 709. n.; Wharton's Dig. h. t. No. 214.

(3) *Russell v. Degrand*, 15 Mass. Rep. 35.

CHAPTER VII.

REPRESENTATION AND CONCEALMENT.

Section 1. *What constitutes a Representation or Concealment.*

Any contract obtained by the fraud of a party, is void in respect to the other parties. This is especially the case in regard to insurance, in which fair dealing and good faith are strictly required by the law, and much relied upon by the parties. The contract is generally entered into by the insurer in consequence of the representations of the assured, and if these representations do not enable the insurer to make a just estimate of the risk, it is plain that he ought not to be bound by the contract.

Representa-
tion and Con-
cealment de-
fined.

(1) *Thompson v. Buchanan*, 4 Brown's Par. Cas. 482. Mil. 79; *Fitzherbert v. Mather*, 1 T. R. 12.

(2) *Clason v. Smith*, and *Cole v. Mar. Ins. Co.* Wharton's Dig. h. t. No. 28. p. 320.

(3) *Walden v. N. York Fir. Ins. Co.* 12 Johns. 128.

(4) *Coulton v. Bowne*, 1 Caines, 291.

(5) *Stewart v. Dunlop*, 4 Brown's Par. Cas. 482. n.; Park, 320.

See also the cases cited in this chapter generally.

A *representation* is a *material* fact stated, before completing the contract, by either party to the other, and a *misrepresentation* is the statement of such a fact which turns out not to be true. By a *material* fact is meant one that shows the nature and extent of the risk, and may induce the other party to enter into the contract. A *concealment*, on the other hand, is the suppression of a *material* fact within the knowledge of either party, which the other has not the means of knowing, or is not presumed to know. It is the suppression of a fact, the disclosure of which would have been an inducement to the other party not to enter into the contract. If either party, whether by design, or through negligence, mistake, or oversight, (1) conceals or misrepresents a fact material to the risk, the contract will be void with respect to the other party. (2) But it will not be affected by the concealment or misrepresentation of a fact not material to the risks insured against, (3) as where the policy is against sea-risks only, and the fact suppressed or misrepresented, relates wholly to the risk of capture, and cannot possibly affect the re-a-risks. Chief Justice Lewis says, 'a false representation cannot avoid the policy unless it be on a point material to the risk.' (4)

Concealment or misrepresentation by an agent is considered to be that of his principal, and has the same effect. (5)

A concealment or misrepresentation is held to defeat the contract on the ground of fraud. To give it this effect, however it is not necessary that it should be an intended deception. An insurance was made in England on a vessel from New York to Philadelphia, and from a misconstruction of the captain's letter, as was contended in behalf of the assured, it was represented that the vessel 'was seen safe in the Delaware on the eleventh of December,' when she had been lost on the ninth, by running upon a *chevaux de frise*. Lord Mansfield said, 'a representa-

tion must be true, and if the assured represents facts without knowing the truth, he takes the risk upon himself. (1)

If the assured or his broker omits to state a material circumstance, supposing it not to be material, this discharges the underwriters. (2) An insurance from Newport, in Rhode Island, to Passage, in Spain, was made upon goods which had been brought from Lagaira, without being unloaded in the United States, so as to constitute an importation, and this circumstance was not made known to the underwriters. The goods being captured, were condemned on the ground that it was an entire voyage from a Spanish colony to Spain. Mr. Justice Washington said, 'The omission to communicate the circumstance of the not unloading the cargo, if material to the risk, whether by fraud or accident, vacated the policy. The underwriter takes the risk, under the condition that he shall be informed as to all facts within the private knowledge of the assured.' (3)

The obligations of good faith are equally binding upon both parties; though the facts to be disclosed are generally in the knowledge of the assured, yet the insurer is equally bound to disclose all circumstances material to the risk within his private knowledge. If an underwriter insures a vessel which he knows to have arrived, the policy is void. (4) Where the insurance was against the risk of being drafted, under an act of parliament, to serve in the militia, and the assured was told by the underwriter, that 'he was secured completely against the operation of the act,' and it appeared that he was not so secured, Lord Ellenborough held the policy to be void. (5)

A representation may be made orally or in writing. (6) It is, however, most frequently made in writing, or reduced to writing by the consent of the parties at the time of making the policy, and it is for the mutual advantage of the parties to adhere strictly to this practice, since it has a tendency to produce a more careful and fair representation of the risk by the assured, and saves the parties from suffering by the forgetfulness or mistakes of witnesses.

When a broker is employed it is still advisable for the assured to have the representation made in writing, as the broker may, from mistake or a disposition to put the risk in a favourable light, make incorrect representations. Formerly many policies were defeated from this cause, which induced the practice in London of preserving the written representations. In 1778, Lord Mansfield said, the written instructions of the assured to the broker, 'were never kept till many years ago, upon the occasion of several actions upon policies, where the brokers had represented many things they ought not to have represented, in consequence of which the plaintiffs were cast; I advised the assured to bring an action against the brokers, which they did and recovered.' (7)

If one party state a material fact, at such time and under such circumstances, as that the other may be supposed to have been thereby induced to enter into the contract, the statement is a representation. In one case it was stated, at the time of sub-

(1) *Macdowall v. Fraser*, Doug. 260.

(2) *Shirley v. Wilkinson*, Doug. 306. n.

(3) *Kohne v. Ins. Co. N. A. Condy's* Marsh. 473. n.

(4) *Carter v. Boehm*, 3 Burr. 1905.

(5) *Duffell v. Wilson*, 1 Camp. 401. See also *Astley v. Ray*, 2 Taunt. 214.

(6) *Livingston v. Delafield*, 1 Johns. 523; 3 Caines, 49; *Pawson v. Watson*, Cowp. 785.

(7) *Pawson v. Watson*, Cowp. 785.

At what time a representation must be made.

scribing the *slip*, that the ship was American, which it was, but being captured by the Spaniards it was condemned as not having on board the documents required by the treaty between the United States and Spain. Lord Ellenborough said, 'as the ship was not represented to be American *at the time when the insurance was effected*, the assured was not bound by it, and there was no necessity for her being documented as an American.'⁽¹⁾

(1) *Dawson v. Atty*, 7 East, 367.

Mr. Marshall expresses some doubt of this decision, and says, that an 'underwriter when he puts his name on the *slip*, does so upon the faith of the representation previously made to him, (no matter when) and he afterwards subscribes the policy without conceiving that any repetition of the representation is necessary.'⁽²⁾ About two years after the preceding case was decided, the same question came again before the Court of King's Bench. At the time of signing the *slip* and about a week before signing the policy, the assured had stated that the ship would 'sail with two other armed ships, and that she was herself to carry ten guns and twenty-five men.' Lord Ellenborough said, 'if a representation is once made, it is to be considered as binding, unless there is evidence of its being afterwards altered or withdrawn.' And in regard to the above case of *Dawson v. Atty*, he said, 'there, the first conversation was qualified and controlled by what followed, for when the policy came to be signed, the broker said, generally, that 'it was an insurance on goods in the Hermon,' without describing her as of any particular country.'⁽³⁾

(3) *Edwards v. Footner*, 1 Camp. 530.

(4) *Wittingham v. Thornborough*, 2 Vern. 206; *Prec. in Chan.* 20; *Wilson v. Dacket*, 3 Burr. 1361.

(5) *Biays v. Union Ins. Co.* Condry's Marsh. 465. n.; Wharton's Dig. h. t. No. 17.

(6) *Gladstone v. King*, 1 M. & S. 35. See also *Fitzherbert v. Mather*, 1 T. R. 12.

(7) *Reid v. Harvey*, 4 Dow, 97.

Obvious inferences from facts stated, are a part of the representation.

The conduct of the assured, or the circumstances under which the insurer subscribes the policy, may be equivalent to a representation, and have all the effect of a misrepresentation. Where one insurer, having a secret understanding with the assured, that he is not to be bound by his subscription, is merely a '*decoy duck*,' this deception is equivalent to a misrepresentation in respect to the other insurers, who will accordingly not be bound by their subscriptions.⁽⁴⁾ So if the assured neglects to obtain a knowledge of facts material to the risk, with a fraudulent purpose, it is equivalent to a misrepresentation or concealment.⁽⁵⁾ Or if there is no negligence on the part of the assured himself, or the broker employed to effect the policy, yet if the captain neglects to inform the assured on the ship of a circumstance material to the risk, in a letter received by the assured before the policy is effected, it is a concealment.⁽⁶⁾

The provisions of the policy may have the effect of a misrepresentation or concealment. Insurance was made on goods from Lisbon to Clyde at a premium of ten per cent, 'to return five for convoy and arrival;' when the assured knew that the vessel had sailed without convoy. The policy was held to be void.⁽⁷⁾

A representation is construed according to the fair and obvious import of the words, and considered equivalent to an express statement of all the inferences naturally and necessarily arising from it. A representation by a resident in a neutral country that the goods are his own, has been held to be a representation

that they are neutral property,(1) and equivalent to a warranty of their being so.(2) A representation that the ship is American is in effect a representation that it will be documented as such.(3)

It being stated by the broker to the underwriter that the ship insured was at Guadaloupe on the 28th of July, when the risk was to commence, the court said, 'when it is stated that she was at Guadaloupe on a certain day, it must mean that she was there in safety, and that no preceding accident was to be made good by the insurers.(4)

Mr. Justice Bayley, speaking of a representation that the ship was 'at Elsineur on the 26th of July, all well,' said, 'the natural conclusion would be that she was left there well at that time,' and this was the construction of the representation adopted by the court. In this sense it was false, for the vessel had sailed from that port on the 26th of July, six hours before the assured himself had sailed from the same port in another vessel, which had experienced rough weather and had a long passage.(5)

If the assured states a mere expectation or opinion, or expresses himself in a qualified and doubtful manner, yet at the same time fairly, but without any absolute assertion of a fact, it has been held not to be a representation. Lord Mansfield said, 'if in a life policy the assured says he *believes* the man to be in good health, not knowing any reason to believe the contrary, though the person is not in good health, it will not avoid the policy.'(6) And where the assured said, 'the vessels were *expected* to leave Africa in November or December,' and they had left in May, it was held not to be a representation.(7) So where the broker said the vessel was American, but 'he was directed not to warrant any thing,' it was held not to be a representation.(8)

In case of the insurer's proposing to have a warranty introduced, that the ship should sail from St. Petersburg before the first of August, and the broker said, 'There is no occasion for that; the ship has sailed some time and must now be at Gothenburg; there is a cargo ready for her, and she is sure to be an early ship,' and the ship had arrived at Gothenburg before the 13th of June, when this conversation took place, but was detained there, waiting for a cargo, until after the 8th of September, Lord Ellenborough said, 'I find no representation here upon the falsity of which the underwriters can defend themselves. The broker said in unqualified terms, that a cargo was ready, but this from its very nature was only the subject of expectation and belief. All the broker could be understood to mean, was, that a cargo had been ordered, and that there was every reason to suppose it would be ready.'(9)

The consignee of goods insured from Lisbon to London, had received a letter from the owner and consignor, dated October 27th, 1807, saying the goods would be sent by a Portuguese ship which 'would sail in a few days.' This letter was not shown to the underwriters, but the broker told them, 'that the ship was to sail in a few days.' It appeared by the broker's testimony

(1) *Vandenheuvel v. Unit. Ins. Co.* 2 Johns. Cas. 451.

(2) *Vandenheuvel v. Church*, 2 Johns. Cas. 173. n.

(3) *Steel v. Lacy*, 3 Taunt. 285.

(4) *Kemble v. Bowne*, 1 Caines, 75.

(5) *Kirby v. Smith*, 1 B. & A. 672.

(6) *Pawson v. Watson*, Cowp. 785.

(7) *Barber v. Fletcher*, Doug. 305.

(8) *Christie v. Secrétan*, 8 T. R. 192.

(9) *Hubbard v. Glover*, 3 Camp. 312.

that if it had been represented that the ship would not sail within a month, insurance could not have been effected, as the French army was expected at Lisbon. The ship did not sail until the 29th of November, and was the next day stopped in the Tagus by the French. Lord Ellenborough said, 'The owner of the goods could speak of the sailing of the vessel only from probable expectation, and if such representation was made *bona fide* it should not conclude him.' The other judges were of the same opinion.(1)

(1) Bowden
v. Vaughan,
10 East, 415.

At the time of effecting a policy on a ship at and from Messina to England, the broker had represented that the ship 'was then at or near Messina, or on her homeward voyage.' Mr. Justice Gibbs, said, 'It was only a conclusion which he drew, and if there was reason to doubt the truth of the conclusion, the underwriter should have inquired into the ground of that expectation.'(2)

(2) Brine v.
Featherstone,
4 Taunt. 869.

'To constitute a representation,' says Chief Justice Marshall, 'there should be an affirmation or denial of some fact, or an allegation which would plainly lead the mind to the same conclusion. If the expressions are ambiguous, the insurer ought to ask an explanation;' and such was the opinion of a majority of the judges, though some of them seemed to be inclined to the opinion that an ambiguity ought to be construed against the assured.(3)

(3) Living-
ston v. Mar.
Ins. Co. 7
Cranch, 535,
& 538.

A represen-
tation to the
first under-
writer ex-
tends to the
others.

(4) Barber v.
Fletcher,
Doug. 305.
See also Paw-
son v. Watson,
Cowp. 785 ;
Stackpool v.
Simon, Park,
648 ; Marsh.
772 ; Feise v.
Parkinson, 4
Taunt. 640.

'It has been determined in a variety of cases,' says Lord Mansfield, 'that a representation to the first underwriter extends to all the others.'(4) The reason of the rule is, that they may have subscribed upon their confidence in his judgment and knowledge of the risk, of which they would not have the advantage, unless they could avail themselves of all the conditions upon which he subscribed. This reason applies exclusively to representations in favour of the risk, and which might induce the first underwriter to subscribe. A representation unfavourable to the risk, and which would have a tendency to prevent the first underwriter from subscribing, does not come within the reason of the rule ; for though the subsequent underwriters may be allowed to subscribe upon their confidence in the opinion of the first, without thereby putting themselves in a worse situation than that of the first, yet it seems to be going very far, to suppose, absolutely, and in all cases, that they do so subscribe ; and unless this supposition is made, a representation of a fact, the suppression of which would avoid the policy on the ground of concealment, ought to be brought home to the knowledge of each individual insurer.

But it has been held that a representation to the underwriter who first agreed to take the risk, and whose name stood first on the slip but not on the policy, did not extend to the other underwriters. One reason given was that the slip, not being stamped, could not in England be produced in evidence to show that the person who appeared, by the policy, to be the first underwriter, was not so.(5) But this case seems to be within the reason for extending to all the underwriters a representation made to the first.

(5) Marsden
v. Reid, 3
East, 572.

There seems to be the same reason for giving subsequent underwriters all the advantage of a representation made to an intermediate one; since they may be induced to subscribe by their confidence in the judgment of either of the prior underwriters. But Lord Ellenborough said, in a *Nisi Prius* case, 'What passed between the intermediate underwriters is to be considered merely as *res inter alios acta*. It is difficult to see on what principle of law a representation to the first underwriter is considered as made to all who afterwards underwrite the policy. That rule being established I will abide by it; but I will by no means allow it to be extended. You must show the representation to be made to the first underwriter on the policy, or to the defendant himself.'⁽¹⁾

A representation to intermediate underwriters.

The same judge said in another case, 'The proposition that a communication to the first underwriter is virtually a notice to all, is to be received with great qualification. It may depend on the time and circumstances under which the communication is made. On the mere naked unaccompanied fact of one name standing first upon the policy, I should not hold that a communication made to him was virtually made to all the subsequent underwriters.'⁽²⁾

(1) *Bell v. Carstairs*, 2 Camp. 543.

Other judges have expressed the same opinion. Heath, J. said, 'Evidence of representations made to the first underwriter had been admitted, but rather on precedent than on reason;' and Mansfield, C. J. 'it had never been extended to underwriters subsequent to the first; the reason why it was admitted as to the first was, that the others were apt to pin their faith upon his judgment, which reason did not extend to representations made to the latter subscribers.' Gibbs, J. said, 'I have looked into all the cases and none of them carry it further than a representation to the first underwriter.'⁽³⁾

(2) *Forrester v. Pigou*, 1 M. & S. 13.

A representation to an underwriter on one policy, has been held not to be such to an underwriter on a subsequent policy on the same property and against the same risks.⁽⁴⁾

(3) *Brine v. Featherstone*, 4 Taunt. 871.

(4) *Elting v. Scott*, 2 Johns. 157.

Section 2. *What facts must be disclosed. Misrepresentation.*

The assured is not required to represent facts of general notoriety, or which are presumed to be known to those conversant with the trade; but he is required to state fairly and fully other facts within his knowledge that are material to the risk. 'If a knowledge of the circumstances suppressed would have induced the insurer to demand a higher premium or to refuse to underwrite, it will invalidate the policy.'⁽⁵⁾

'Good faith,' says Lord Mansfield, 'forbids either party, by concealing what he knows, to draw the other into a bargain, from his ignorance of that fact, and his believing the contrary. The facts lie most commonly in the knowledge of the assured only, the underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance to mislead the underwriter, and induce him to estimate

(5) *Murgatroyd v. Crawford*, 3 Dal. 491; *N. York Firem. Ins. Co. v. Walden*, 12 Johns. 517; *Per Kent Chancellor*.

the risk as if it did not exist. The keeping back such circumstance is a fraud, and although the suppression should happen through mistake, the policy is void because the risk is different from that understood and intended to be run. He need not mention what the underwriter knows, what way soever he came by that knowledge, or what he ought to know, or takes upon himself the knowledge of, or waives being informed of, or what lessens the risk agreed and understood to be run, or general topics of speculation, or every cause which may occasion natural perils, as the difficulty of the voyage, kind of seasons, probability of hurricanes, earthquakes, &c. or every cause which may occasion political perils, from the rupture of states, from war, and the various operations of it, upon the probability of safety from the continuance or return of peace, or the imbecility of the enemy. If the insurance be on a private ship of war, from port to port, the underwriter needs not to be told of the secret enterprises it is destined upon. From the nature of the contract he waives this information. If he insures for three years, he needs not to be told any circumstance to show it may be over in two, or if he insures a voyage with liberty of deviation, he needs not to be told what tends to show there will be no deviation. Men argue differently from natural phenomena, and the means of information and judging are open to both; each professes to act on his own skill and sagacity. The rule is adapted to facts which are privately known to one party, and which the other is ignorant of, or has no reason to suspect.'⁽¹⁾

(1) *Carter v. Boehm*, 3 Burr. 1905; 1 Bl. 593.

Property at Fort Marlborough, in Sumatra, belonging to Carter, the governor, was insured against loss by capture, for one year from the 16th Oct. 1759. The place was taken by the French under Count D'Estaing within the year. At the time of effecting the policy in London, in May 1760, the agent of Governor Carter knew of a letter from him, dated at Fort Marlborough the 16th Sept. 1759, notifying to the East India company that the French had the preceding year a design of attacking the settlement, which they might probably revive, and that the fort was badly supplied, and could not be maintained against a European enemy. The agent had also received a letter from the Governor, dated four days afterwards, of the same import, and requesting him to get insurance. Neither of these letters were disclosed to the underwriter.

Lord Mansfield said, 'The underwriter at London, in May, could judge much better of the probability of the fort being attacked than Governor Carter could at Sumatra, the September before, because he might have obtained all the information that the governor had at that time, and he had a knowledge of the subsequent political events in Europe besides, and also what forces had been sent out to India by the French and English. If there had been an enterprise on foot, to the knowledge of the Governor, when he sent to have insurance made, it would have varied the risk understood by the underwriter; but he had no knowledge of any such design; it was formed on a sudden, just before it was executed. The underwriter knew the governor

must be acquainted with the state of the place, and could not disclose it consistent with his duty, and that by insuring he at least apprehended the possibility of an attack. With this knowledge, without asking a question, he underwrote. By so doing he took the knowledge of the state of the place upon himself. It was a matter of which he might have been informed various ways; it was not within the private knowledge of the Governor. If the probability of an attack by a European force was in the contemplation of the parties, and not the sufficiency of the fort to resist it, then the assured's not stating that the fort could not resist such an attack, was no concealment; as to the design of the French to attack the fort the year before, that was no part of the facts upon which the insurance was made. It was doubtful whether there had been any such design, and if there had, the inferences to be made from it were matters of mere speculation. If a man insured a ship, knowing that two privateers were lying in her way, without mentioning that fact, it would be fraud; but if he knew that two privateers had been there the year before, it would be no fraud not to mention that circumstance.⁽¹⁾

It is sufficient if the assured discloses the condition of the ship at the date of his last intelligence, without giving an account of previous events. The assured had received intelligence that the natives on the coast of Africa had attacked the vessel, and killed the captain, and several of the crew, whereby, and in consequence of disease, the crew had been reduced from twenty, to five; he afterwards received intelligence of the subsequent condition of the ship, and that there were nine men on board. He disclosed only the last intelligence to the insurers. Lord Ellenborough said, 'you are not obliged to inform the underwriters of all by-gone calamities. If the underwriters were truly informed of all the circumstances known to the assured on his latest information, it is sufficient.'⁽²⁾ So the court in New York, speaking of a risk at and from Guadaloupe, to commence on the 28th of July, said, 'it cannot be material where the ship was prior to that day.'⁽³⁾

A ship insured 'at and from London, lost, or not lost,' had sailed before the policy was made; which circumstance was not disclosed to the insurer, who for this reason objected to the policy. The court said, 'if the underwriter wanted to know whether the ship had sailed, he ought to have inquired.'⁽⁴⁾

Where the trade is prohibited by the standing and uniform regulations of a foreign country, it is not necessary to represent this fact.⁽⁵⁾ A policy was made on goods, warranted American, from Havana to Carthage, and such a voyage was generally known to be prohibited by permanent regulations of trade. A disclosure of this fact was held not to be requisite.⁽⁶⁾ Nor is it necessary to state in such case that the vessel will carry simulated papers, and that the property will be disguised.⁽⁷⁾

In the case of a vessel engaged in a smuggling trade with the Spaniards on the Mississippi, Lord Mansfield said, 'if the insurer had, with a full knowledge that it was a smuggling trade with

(1) *ib.* See also *Thompson v. Buchanan*, 4 Brown's Parl. Cas. 482. Mil. 79.

(2) *Freeland v. Glover*, 6 Esp. 14; 7 East, 457.

(3) *Kemble v. Browne*, 1 Caines, 75.

(4) *Fort v. Lee*, 3 Taunt. 381.

(5) *Pollock v. Babcock*, 6 Mass. Rep. 234.

(6) *Calbraith v. Gracie*, Condry's Marshall, 388. n.

(7) *Livingston v. Maryland Ins. Co.* 7 Cranch, 506.

Spain, made the insurance, then it might be a fair contract between the parties.'⁽¹⁾

(1) *Lever v. Fletcher*, Park. 360.

If the assured has early intelligence of a new regulation, by which the property is exposed to seizure, it has been held that he is bound to disclose it. An order having been given for insurance in London on a vessel bound to Varel on the Jade, a policy could not be effected, on account of information of a recent decree of the French emperor ordering all vessels entering the Jade to be confiscated. The vessel was insured in the United States, without any disclosure by the assured of a letter informing him of the reason why a policy could not be effected in London. The court said, 'The letter contained information very material in estimating the risk. The withholding it from the underwriter must be considered fraudulent, and the insurance was therefore void.'⁽²⁾

(2) *Hoyt v. Gilman*, 8 Mass. Rep. 336.

(3) *Blagge v. N. York Ins. Co.* 1 Caines, 549.

The usages of the trade need not be stated.

If the trade is sometimes prohibited and sometimes permitted, it has been held that the underwriter is not bound to take notice of its being prohibited at the time of effecting the policy. The existing prohibition, and the necessity of using false papers, must be disclosed.⁽³⁾

The underwriter is presumed to know the particular usages of the trade and the local situation and circumstances of the ports comprehended within the voyage. An insurance was made 'from New York to port Sisal,' and other ports. There is no harbour at Sisal, and vessels lie at anchor in an open roadstead while loading and unloading. The trade was recent at the time of making the insurance, and the fact, that there was no harbour, was not disclosed to the underwriters. Kent, C. J. said, 'the assured was not bound to communicate to the underwriters his knowledge of Sisal. This was a matter of general notoriety, equally open to the knowledge of both parties, and which both must be presumed equally to know.'⁽⁴⁾

(4) *Delonguemere v. N. Y. Firem. Ins. Co.* 10 Johns. 120.

In the case of an insurance on a ship from Oporto to London, a part of the cargo being taken on board within the bar of Oporto, the ship was removed over the bar to take in the remainder, as was usual in regard to ships of like burthen, whence she was driven out to sea by a gale of wind, and captured. The insurers insisted that they should have been informed that a part of the cargo was to be taken in outside of the bar, but Lord Ellenborough held that they 'were bound of themselves to take notice of the usage.'⁽⁵⁾

(5) *Kingston v. Knibbs*, 1 Camp. 508. n.

The same opinion, in effect, was given respecting a policy upon goods to a port in Jamaica 'till landed;' and it was usual at the port of destination in Jamaica, to land the cargo in shallops from ships of the size of that which carried the goods insured. The court said, 'the underwriter should inquire what is the usual mode of landing the goods. Here it seems to have been the usage to transship the goods into shallops.'⁽⁶⁾

(6) *Stewart v. Bell*, 5 B. & A. 238.

Where it is usual for vessels, on the voyage insured, to make an intermediate voyage, such intermediate voyage may be made without apprizing the insurers that it is intended. Such was formerly the practice in India voyages; the East India Com-

pany, uniformly reserved, in the charterparty, the liberty of employing the vessel one year on intermediate voyages from port to port in India. A similar usage prevailed in Newfoundland voyages, and it was held that the assured was not bound to state this to the underwriters. Lord Ellenborough said, 'The underwriter must refer himself to the usage of the trade, which he is bound to know;' (1) 'Is it notorious that ships in this trade upon their arrival at Newfoundland, are either employed in *banking*, or take an intermediate voyage? If so, it must be presumed to be equally in the knowledge of both parties.' (2)

(1) *Ougier v. Jennings*, 1 Camp. 505. n.
(2) *Vallance v. Dewar*, 1 Camp. 503.

It is not requisite to disclose any facts that are stated in the policy, or any circumstance which is provided for by the express stipulations of the parties, and a representation of this sort is of no avail, since it will be controlled and superseded by the written contract.

Facts stated in the policy.

Whatever is the subject of an implied agreement of the parties, needs not be represented except in reply to inquiries made by the insurers. It is an implied agreement on the part of the assured in every policy, whether on the ship, cargo, or freight, that the ship is seaworthy, and in every respect sufficient and well fitted for the voyage on which she is bound. The assured is not therefore required to state, in the first instance, any facts which only affect the seaworthiness of the ship.

Subjects of implied warranty.

The owner of goods insured from Madeira to Charleston had, the day before effecting the policy, received a letter from the captain, at Madeira, stating that 'the ship was very leaky, and that ten pipes of wine had been half covered with water,' of which he did not inform the underwriter, who on that account refused to pay a loss. Lord Mansfield told the jury 'that there should be a representation of every thing relating to the risk, except it be covered by a warranty. It is a condition or implied warranty in every policy, that the ship is seaworthy; and therefore there need be no representation of that.' (3)

The ship leaky.

(3) *Shoolbred v. Nutt*, Park, 346.

In case of insurance on a ship at and from Trinidad to London, the owners had received a letter from the captain, in the West Indies, stating that 'the ship was in very good order, but that he had had a survey on her on account of her bad character,' of which they did not inform the underwriter. The jury found that if this letter had been disclosed it would have varied the premium, even if the survey, which was very favourable to the character of the vessel, had been laid before the underwriter, at the same time; for it was said by some of the witnesses that surveys made in the West Indies were of very little authority. It was insisted in behalf of the underwriter that the disclosure of the information would have varied his opinion as to the prudence of underwriting the risk. Lord Ellenborough, giving the opinion of the court, said, 'Is it then to be laid down as a principle that every fact known to the assured with respect to the condition, quality, and circumstances of the ship, prior to the period of effecting the insurance, which may possibly guide the judgment of the underwriter in undertaking or refusing to un-

Ship surveyed on account of her bad character.

dertake the insurance, is to be communicated to him? It would certainly have some weight in guiding the judgment of an underwriter on such a subject, to know how old the ship was, where she was built, whether originally British or foreign, what was the form of her construction, whether clinker-built or not, whether copper-bottomed or not, what repairs she had received, and when and in what docks those repairs were done, and if the voyage were, as this was, a voyage home, what accidents the ship had met with in her outward voyage. All this may be very convenient and proper for the insurer to be informed of, and all this he may ask of the assured; and if the assured should withhold, upon being asked for it, any material part of such required information, his policy could not be sustained for a moment, for such a suppression would be a fraudulent concealment of material facts. But is it a duty of the assured in the first instance, and as a condition precedent on his part, to inform the underwriter of all these circumstances to the extent of his, the assured's, own actual knowledge on the subject? He thought it was not, and gave the opinion of the court that there was no concealment.(1)

(1) *Haywood v. Rodgers*, 4 East, 590. See *Shoolbred v. Nutt*, Park, 346.

The crew sick.

Where the assured had received a letter from the captain, informing him that the vessel had been detained at Savannah two weeks by the sickness of the crew, and saying also, 'I am at sea with all the hands sick except two, and in a few days expect to get them once more on their legs; they are all better to-day;' and this information was not disclosed to the underwriters; the court intimated no opinion that the policy was affected by the suppression of the letter.(2)

(2) *Dennis v. Ludlow*, Caines, 111.

No concealment in relation to implied warranty, unless inquiries are not answered.

Though an implied warranty excuses the assured from making any statement relating to the subject of it in the first instance; yet he is bound to make true answers to the inquiries of the underwriters relating to the same subject, and if he voluntarily make any statement respecting it, he will be answerable for the truth of the statement. There can therefore be no concealment of facts relating to the subject of an implied warranty, except in the case of the assured's not giving true and sufficient answers to inquiries made by the underwriters.

Moral character of the captain.

The ship *Suffolk*, insured from Belfast to Lisbon and thence to New York, had previously sailed from New Orleans to Belfast, and upon that voyage the master, Cartwright, had put into Havana for water, as he informed his owners, upon whom he drew a bill while at Havana in favour of an Havana merchant for 800 dollars, which the owners had refused to pay, giving as a reason that no account of supplies for the *Suffolk* was sent with the bill, and they had understood from the captain that he put into Havana only for water. On the same voyage from New Orleans to Belfast, the *Suffolk* had been compelled by tempestuous weather to put into Cork, in Ireland, where she underwent repairs, and thence arrived safe at Belfast, where the voyage insured was to commence. While the *Suffolk* was at Cork, March 19th, 1811, Messrs. Harvey and Co. the agents of the vessel there, wrote to Cropper and Co. of Liverpool, under

whose general control and direction the vessel and cargo had been put by the owners, 'that a vessel had got foul of the Suffolk, and carried away her bowsprit; that they feared Captain Cartwright was careless of his business, and his amount of repairs and expenses would astonish them all; and that his detention had been very great, yet he seemed very easy under it.' Cropper and Co. of Liverpool, had sent to the owners in New York a copy of this letter, and written to them, 'This day we shall write again [to Cartwright, the captain,] pointedly, and urge that necessity of economy and despatch, which we early enjoined him to observe. All that in us lies shall be done to get the Suffolk on to Belfast, and to guard your interest; but if a master of a ship will not do his best, an agent is placed in ungrateful circumstances.' The letter from Liverpool had been received by the owners before they effected the policy in question. They replied to their Liverpool correspondents, 'that the information confirmed their apprehension as to Captain Cartwright's conduct; and that if he was still under their control they wished them to discharge him.' Neither the letter from Liverpool, nor the circumstance of the bill from Havana, were disclosed to the underwriters at the time of effecting the insurance. Cartwright still continued in the vessel, and sailed on the voyage insured to Lisbon, where he took in a cargo of salt for New York, but he sailed for New Orleans, and on the voyage thither, touched at Matanzas, where he hypothecated the ship and cargo to raise money, which did not appear to have been necessary for the purpose of procuring supplies or repairs. The assured demanded indemnity for the loss occasioned by this misconduct and fraud of Cartwright. The insurers refused to pay, on the ground that there had been a concealment. For the assured it was urged that the intelligence from Liverpool related to a subject of an implied warranty, 'that the master shall have ordinary integrity, or a good moral character at the place from whence the vessel sails, when the risk commences,' and therefore that the assured was not bound to disclose these facts, unless particular inquiries had been made. For the underwriters it was replied, that the nautical skill of the captain was a subject of the implied warranty of seaworthiness, but not his moral character; and as the barratry of the master was one of the risks insured against, any facts showing the moral character of the captain, that might be a ground on which to calculate the extent of that risk, ought to have been disclosed. Platt, J. in giving the opinion of the court, said, 'There should be a representation of every fact within the knowledge of the assured which is material to the risk incurred by the underwriter, except it be covered by a warranty. Unseaworthiness, under this policy, is at the risk of the assured, and therefore they are not bound to disclose any thing, unsolicited, on that subject. If the letters charged to have been concealed, related merely to unseaworthiness, it is a sufficient answer that the assured never sought indemnity against that risk. In this view of the case, it appears to me that the assured were not bound to disclose the

- letters and other facts in regard to the character and conduct of the captain.(1)
- (1) *Walden v. N. York Firem. Ins. Co.* 12 Johns. 128.
Intelligence published at Lloyd's.
- (2) *Friere v. Woodhouse*, 1 Holt, 572.
What is published in a Gazette is not presumed in all cases to be known to the insurers.
- (3) *Dickenson v. Com. Ins. Co. of N. Y.* Anthon's Cas. at N. P. 92.
The ship not ready to sail immediately.
- (4) *Beckwith v. Sydebotham*, 1 Camp. 116.
False clearance.
- (5) *Barnewall v. Church*, 1 Caines, 217. See also *Talcot v. Mar. Ins. Co.* 2 Johns. 130.
- At the time of insuring the ship *Louisitania* from the Brazils to Lisbon, it was communicated that she had been out fifty-seven days, but the assured did not inform the underwriters that the *Victorioso*, which sailed in company with his ship, had arrived at Lisbon. This circumstance had however been published in the list of arrivals at Lloyd's, where the policy was effected. Burrough, J. said, 'The arrival of the other vessel must be presumed within the knowledge of the underwriters, from the circumstance of its being contained in Lloyd's printed lists.' A special jury of merchants concurred in this opinion.(2)
- But the insurers are not presumed to know all the marine intelligence published in the newspapers of the place, even though taken in their own office. Insurance was made in New York on the 'sloop *Friendship*, from Washington in N. Carolina to Charleston in S. Carolina.' A newspaper of the 19th of April, taken at the office of the insurers, contained intelligence that 'a New York sloop, bound from Wilmington in N. C. to Charleston in S. C. had been stranded on *Ocracoke-Bar*.' On account of this intelligence the risk was refused at one office on the 20th of April, and afterwards, on the same day, the assured applied for the policy in question, without disclosing this intelligence; and the policy was held to be void.(3)
- It is not necessary to disclose that the ship is not ready to sail immediately. At the time of effecting a policy on the 19th of June, upon a vessel and cargo from Pictou in Nova Scotia to Liverpool, the assured had received a letter from the captain, dated at Pictou the 11th of May, stating that the ship had received much damage on the outward voyage, and stood in need of great repairs. This was not communicated to the underwriters, who contended that it should have been so, as affecting the time when the vessel would sail, as otherwise the insurers might take a winter risk, when they only intended to take a summer risk. Lord Ellenborough said, 'If it was necessary to have disclosed this letter, as governing the time when the vessel would sail, it would in all cases be necessary to inform the underwriters when repairs were wanting; and he believed it very frequently happened that a ship must have something done to her before she could sail on the homeward voyage. If the underwriters wished to have particular information on this subject they ought to ask for it.'(4)
- It is not requisite to inform the insurers that the ship takes out a clearance for a port of destination different from that for which she in fact sails, unless the false clearance affects the risk materially. A vessel cleared out at Honduras for Portsmouth, for the purpose of saving duties, though she sailed for New York, to which port she was insured. The omitting to disclose this fact did not affect the policy.(5)
- So in the case of a ship insured from London to Nantz, with liberty to touch at Ostend, for which port she took a clearance, for the purpose however of avoiding certain duties, and without

any intention of touching at Ostend, it was held that the policy was not affected by the omission of the assured to state the purpose of clearing for Ostend. The same vessel had fictitious papers of clearance from Ostend, of which also no disclosure had been made to the insurers. But it appeared that this was the usage of the trade, with which the insurers were presumed to be acquainted.(1)

(1) *Planché v. Fletcher*, Doug. 251.

Registered ships are, in England, required by law not to sail without convoy during war, unless with a license for that purpose. Insurance being made on a ship not required to be registered, and which might accordingly sail without convoy, the jury found that the fact of the ship's not being registered, need not be disclosed to the insurers; and the court acquiesced in this verdict, thinking it a question that depended in some measure on usage, and so to be determined by the jury.(2)

Convoy.

But where the broker was informed by the owner of goods insured from Bristol to Port Mahon, that the ship 'was to have gone to Falmouth to join convoy, but he supposed the wind was contrary and she could not fetch the port, but he knew nothing about it himself,' but did not disclose this circumstance to the insurers, though he knew it to be a fact that the vessel had sailed without convoy; this was held to be a material concealment.(3)

(2) *Long v. Duff*, and same *v. Bolton*, 2 B. & P. 209.

At the time of effecting a policy, Nov. 12th, 'on wines on board the Stag, from Oporto to Liverpool,' a part of the premium to be returned for convoy, the assured did not disclose either of two letters received the 30th of October from his correspondents at Oporto, one of the 11th of the same month, saying, 'We are loading the wines on the Stag, Captain Wheatley, who *pretends* to sail after to-morrow,' the other of the 13th, by which it appeared that the vessel was to sail with convoy. The convoy with which the Stag proposed to sail had arrived on the 30th of October, and the Stag was not included in the list of ships entered at Lloyd's as having sailed with the convoy. Lord Ellenborough said, 'The letter of the 11th would have made known to the insurer the captain's intended time of sailing, that of the 13th, that the lading was completed and she was ready to sail; he would have found that the convoy had arrived without her, and from that circumstance must have inferred a disappointment in the original intention of the parties; I cannot help thinking these letters were material.' Grose, J. said, 'It is not the less a concealment because made without any view of fraud.' Le Blanc, J. thought that the facts, if disclosed, would have shown that the ship was a missing ship.(4)

(3) *Sawtell v. Loudon*, 5 Taunt. 359; 3 C. 1 Marsh Rep. 99.

The ship did not sail at the time, and with the convoy proposed.

Where the assured did not disclose a letter from the Cape of Good Hope, stating that there were then two or three French privateers in those seas, it was held to be a material concealment.(5)

(4) *Bridges v. Hunter*, 1 M. & S. 15.

Intelligence of armed ships hovering near.

In effecting insurance on the 24th of March, upon the privateer Hazard, from the 6th of that month, for two months, the broker omitted to disclose, that on the 8th and 9th of March there were reports in Jersey, whence the Hazard had sailed on

(5) *Beckwaite v. Nalgrave*, 1 Holt, 288. n. and cited 3 Taunt. 41.

(1) *Durell v. Bederley*, 1 Holt, 283.

Intelligence that the ship laboured and was deep and leaky.

(2) *Lynch v. Hamilton*, 3 Taunt. 37.

Premium demanded by other insurers.

(3) *Sibbald v. Hill*, 2 Dow, 283.

(4) *Clason v. Smith*, Wharton's Dig. h. t. No. 30. p. 320.

(5) *Boyd v. Dubois*, 3 Camp. 133.

Damaged state of the goods.

(6) *Oliver v. Greene*, 3 Mass. Rep. 133; *Lawrence v. Van Horn*, 1

Caines, 276; *Locke v. N. A. Ins. Co.*

13 Mass. Rep. 61; *Bartlett v. Walter*, 13

Mass. Rep. 267.

the 6th, that some French frigates were about the coast; that a capture had been made on the 7th; and that, on the latter day, a ship's binnacle had been afloat on which was a compass of a particular construction. Gibbs, C. J. said, 'Loose rumours, which have gathered together no one knows how, need not be communicated. In the present case, the reports cannot be called loose.' He thought they were such intelligence as ought to have been communicated.(1)

A policy on goods, 'by ship or ships,' was intended by the assured to cover goods on board of the *President*. Before the policy was effected, intelligence had been posted up at Lloyd's, that the *Howard*, 'off the Salvages, on the 27th of October, one day's sail from Lancerota, fell in with the *President*; she appeared labouring much, and to be very leaky and deep laden.' The assured did not disclose this intelligence, nor the fact that any part of the goods insured were on board the *President*. The master of the *President* afterwards stated, in giving his testimony, that at the time of seeing the *Howard* on the 27th of October, the *President* was in good order, perfectly seaworthy, and neither leaky nor deeply laden. Mansfield, C. J. said, 'No doubt a person insuring is bound to communicate every intelligence that may affect the mind of the underwriter as to the points, whether he will insure at all, and at what premium he will insure.' And the court was of opinion that this was a concealment of material facts, and that the circumstance of the intelligence eventually proving to be incorrect, did not excuse the suppression of it.(2)

The rate of premium demanded by insurers acquainted with the trade would naturally have an influence upon the underwriter in estimating the degree of risk. Therefore, when the broker at London wrote to the underwriters in Scotland, that the assured 'had done as much insurance as the underwriters at London were inclined to take, at eight per cent,' and none had been done at London at that rate, it was held to be a misrepresentation.(3) And in case of the assured's writing from New York, 'I have no doubt I could get the insurance done here at fifteen per cent,' when in fact the underwriters in New York had refused the risk at that premium, a similar decision was made.(4)

In case of a policy on hemp the insurer undertook to prove that the hemp was put on board in a damaged state, and objected to the validity of the policy on the ground that this circumstance was not disclosed to him, alleging that hemp put on board in a damaged state, was liable to effervesce and take fire. Lord Ellenborough said, 'I most positively say that the assured were not bound to represent to the underwriters the state of the goods. It would introduce endless confusion and perpetual controversies if such a duty were imposed upon the assured.'(5)

If the assured is only a part owner, or a mortgager or mortgagee of the ship or goods insured, or a charterer of the ship, with an agreement to pay for it if lost, it is not requisite that he should make known his qualified or partial interest.(6)

Lord Kenyon instructed the jury that freight could not be insured for a part of the voyage only, at least without disclosing this circumstance; but this opinion has been overruled.(1)

It was made a question in France, whether the agent must disclose that he received by express the order to effect insurance. It was decided by one tribunal that this should have been made known to the underwriters, but the decision was reversed on appeal, it being proved that special messengers were often sent between the same places for this purpose, and the circumstance therefore indicated nothing extraordinary.(2)

In the case of an insurance on a ship from London to Jamaica, in which voyage there are three different courses from a certain point, one immediately to the southward of St. Domingo, another farther south, and a third to the northward of that island; and which of the three is preferable in any particular instance, depends upon circumstances of which the captain is to judge at the time; the vessel was, by the charterparty, to touch at Cape Nichola Mole in St. Domingo, and the captain was accordingly instructed to take the course to the northward of that island, which he did, without exercising any discretion as to the choice. The vessel was pursuing that course, having passed the dividing point, but not having yet turned off from the direct course to Jamaica to put into Cape Nichola Mole, when she was captured. The underwriters contested the loss, and one ground of objection was, that the captain was restrained by his instructions from taking the course he might think the best, when it ought, according to the usage of the trade, to have been left to his discretion to choose, or his being limited to one course should have been disclosed to the underwriters. The jury found a verdict for the underwriters on the ground of concealment, and the court afterwards confirmed it, when Lord Kenyon said, 'the captain ought to exercise his discretion in each particular case, whether he would take one course or the other. It must be taken for granted that the underwriter knew what was the common course of the trade, and expected that the most expedient course would be pursued by the captain, acting on the emergency of the occasion, but in fact his discretion was taken away in this instance. That was a most important fact, and ought to have been communicated to the underwriters.'(3)

The assured is bound to disclose intelligence even of a doubtful nature, respecting facts material to the risk. The assured had an account that a ship *described like his* was taken; and he effected insurance without disclosing this intelligence. Lord Macclesfield said, 'The assured has not dealt fairly; he ought to have disclosed what intelligence he had of the ship's being in danger, which might induce him to fear, at least, that it was lost. If this circumstance had been discovered, it is impossible to think that the insurers would have insured the ship at so small a premium; but would either not have insured at all, or would have insisted on a larger premium.' The policy was accordingly held to be void.(4) Where the assured, on the

Freight of a part of a voyage.

(1) *Taylor v. Wilson*, 15 East, 324.

Order by express for insurance.

(2) *Poth. h. t. No. 12*; *Estrangin's note*.

The captain limited to one of three different courses.

(3) *Middlewood v. Blakes*, 7 T. R. 172.

Doubtful news must be disclosed.

(4) *Da Costa v. Scandret*, 2 P. W. 170; 2 Eq. Cas. Abr. 636. pl. 2.

(1) *Burr v. Foster*, S. J. C. Mass. Suff. June, 1799. Dane's Dig. tit. Concealment.

On news of loss, the order for insurance must be countermanded.

Aurora of Hartford, had heard of the wreck of a vessel, the name of which, as it was reported by the persons who saw the wreck, was the *Deborah* of Hartford, and they described the vessel to be of a form different from that of the *Aurora*; and the underwriters in New York had refused to underwrite the *Aurora* on account of this news, and the assured obtained insurance in Boston without disclosing the intelligence, the policy was held to be void.(1)

If after having given instructions for effecting a policy, the person who has given the instructions, receives intelligence material to the risk, he must immediately disclose it, or countermand his instructions.

A policy was made in New York, on account of Finkin and Stouffer of Baltimore, on doubloons from Jamaica to Baltimore. Finkin had been at Jamaica, where he embarked with the doubloons for Baltimore. He had written from Jamaica to Stouffer, at Baltimore, informing him of the intended shipment, that Stouffer might get insurance, and his letter was sent by the ship *Friends*. The vessel on board of which Finkin shipped the doubloons and took passage, foundered at sea; and the doubloons were lost. Finkin, with the captain and crew, was taken on board of another vessel, and he was heard to say that he was afraid the vessel on board of which the doubloons had been shipped 'was not insured, though he had written to Mr. Stouffer for that purpose.' He afterwards fell in with the *Friends*, by which he had sent his letter, and went on board of that vessel, in which he arrived at Norfolk on the 30th of September. On the first of October the master of the *Friends* put his letters into the post-office at Norfolk, and among others that of Finkin to Stouffer before mentioned, which was received by Stouffer at Baltimore on the 7th of October, who immediately wrote to New York to order insurance. The policy was accordingly made at New York on the 12th of that month. Stouffer did not know of the loss until the 14th of the same month, when he was informed of it by a letter from Finkin, dated at Fell's Point, a short distance below Baltimore, where he had arrived from Norfolk, having in the mean time remained at Norfolk seven or eight days, and written from that place to Baltimore to other persons, but not to Stouffer. The policy was held to be void, because Finkin did not countermand his instructions for the insurance.(2)

(2) *Watson v. Delafield*, 2 Caines, 224; 1 Johns. 150; 2 Johns. 526.

A vessel lost on Little Egg Harbour Beach about ninety miles from New York on the 26th of March, was insured at New York on the 9th of April following. The assured had no knowledge of the loss at the time of effecting the policy, the only question being whether the policy was void on account of negligence of the master in not communicating intelligence of the loss to the other owners in New York, he being himself a part-owner of the vessel. It appeared that the master had been desirous of communicating the news of the loss to the other owners, and had used the ordinary means, without however having taken any extraordinary steps for this purpose. The court said, 'There is no trace of actual fraud in this case; it is a

question of constructive fraud merely. It does not appear that the captain had directed insurance, or was apprized of any intention of the assured to cause insurance to be made. As we cannot perceive therefore any interested motive in him to withhold the intelligence, the case did not require that extreme diligence that would have been due, had he known that application for insurance was pending. We ought then to exact from him, as part-owner, that ordinary diligence only which the nature of such mercantile concerns, and common prudence and discretion, would demand. The circumstances of the case are a proof of ordinary diligence.⁽¹⁾

(1) *Andrews v. Mar. Ins. Co.* 9 Johns. 32.

The same opinion was given in Scotland, as to countermanding orders for insurance in case of news of a loss, where it was held, however, to be sufficient to send the counter order by the first regular post, without sending express.⁽²⁾ The fraud, negligence, or mistake of the agent, in this as in other cases, will affect his principal.^(a)

(2) *Grieve v. Young, Millar*, 65.

A broker having begun to fill up a policy on the 13th of October, which he did not complete until the 17th, on that day about ten o'clock left his house, with the policy in his pocket, ready to be subscribed by the underwriter, and went to the Royal Exchange, where the underwriter subscribed the policy at about eleven o'clock, the broker having omitted to call previously at his office, where letters addressed to him on business were usually left. Upon arriving at his office on the same morning he found a letter informing him of the capture of the ship. Mansfield, C. J. said, 'It was somewhat material that the policy was begun a day or two before the insurer signed it.' Gibbs, J. 'The question is, whether the broker had a right to presume that he had possession of all the information on which he was to effect the policy.' And the court acquiesced in the verdict of the jury in favour of the assured.⁽³⁾

(3) *Wake v. Atty.* 4 Taunt. 493.

If the vessel is known to be out of time, this circumstance must be stated to the underwriters. A policy on a ship and cargo from Lisbon to London, was effected at London on the 2d of December, and the assured had on the 24th of November received a letter from the captain at Lisbon, dated the 8th of that month, informing him that the vessel was then ready to sail; which he did not communicate to the underwriters. He had also information, at the time of effecting the policy, that the vessel had sailed, which information he received by another vessel that sailed at the same time; and this circumstance also was not disclosed to the underwriters. Lord Kenyon instructed the jury that the policy was void. He said, 'the underwriter ought to be acquainted with every circumstance respecting the ship's time of

Ship out of time.

(a) *Fitzherbert v. Mather*, 1 T. R. 12. According to the French Ordinance, h. t. a. 41, and the Code of Commerce, a. 179, a party who underwrites upon property which he knows to have arrived, or who procures insurance upon property which he knows to be lost, forfeits to the other party double the amount of the premium. Poth. h. t. No. 13. Estrangin's note.

sailing, inasmuch as the premium sustained so considerable an advance, when the ship was deemed a missing ship.'(1)

(1) *M'Andrews v. Bell*,
1 Esp. 373.

In case of insurance on a ship from Liverpool to the Baltic, the ship sailed from Liverpool on the 7th of September, and the policy was made on the 23d of October following. The counsel for the insurer stated that the voyage from England to Elsinour was from fourteen to eighteen days, and a list called the Sound List was kept at Elsinour, containing the names of all vessels that passed the Sound, which list could be brought to England in ten or twelve days. The ship was captured on the 19th of September, but this was not known to the assured at the time of effecting the policy. Nothing was said to the underwriters respecting the time of the ship's sailing. Lord Kenyon held the policy to be void on this account, and the jury, being a special one, concurred with him in opinion.(2)

(2) *Webster v. Foster*, 1
Esp. 407.

Where a policy was on goods from Berderygge to London, the persons who effected the policy had received a letter from the shipper of the goods, dated the 30th of November, saying, 'I think the captain will sail to-morrow; but should he not be arrived in your port, you will be so kind as to make insurance as low as you possibly can.' This letter was received in London on the 13th of December, and on the next day the policy was effected without communicating to the insurers the contents of the letter. It appeared that vessels did not sail on this voyage unless the wind was fair, and that it was often performed in four or five days, and when the weather was not favourable, in about ten days. Upon these facts Sir James Maulefield said, 'I have great difficulty in conceiving how the omission to communicate the letter in question to the underwriters can be deemed immaterial. When the shipper says he expects the captain to sail to-morrow, it imports that he who writes knows the ship to be in such a condition as to give a just expectation of her sailing at that time; he then desires the consignee, in case the ship should not have arrived, to effect insurance as low as possible. By this he seems to have supposed that the ship might have arrived before the letter, and that, if it did not, a high premium would be exacted.' He accordingly thought the information material, and that the policy was void, in which opinion the other judges concurred.(3) The same principles are recognised in a case decided in New York.(4) And, in general, if the assured, or his agent who effects the policy, knows any fact tending to show that the vessel is out of time, he must disclose it, or the policy is void.(5)

(3) *Willes v. Glover*, 1 N. R. 14.
(4) *Livingston v. Delafield*, 3 Caines, 49.
See also *Kay v. Young*, *Millar*, 62.
(5) *Johnson v. Phoen. Ins. Co.* *Wharton's Dig.* h. t. No. 24. p. 319.
Condy's Marsh. 470. n.

But if the intelligence concerning the sailing of the vessel does not tend to show that she is out of time, and would not induce the underwriter to demand a higher premium, it is not necessary to disclose it. Insurance on the Cumberland, from Barbadoes to Liverpool, was effected at Whitehaven, by order of a broker at Liverpool dated on the 8th of January, saying, 'The Cumberland, we expect, will have taken her departure from Barbadoes on the 26th of November. The Barton sailed on the 24th, and arrived at Liverpool on the 5th of January, but

she is coppered, and a remarkably fleet vessel.' He also said that another vessel, that sailed on the 29th of November, had arrived on the 5th of January, which was likewise coppered and a remarkably fast sailer; but that the Cumberland was not coppered, was full built, and a slow sailer, and was not considered a missing ship. A witness stated that a knowledge of the arrival of those two vessels would not have varied the premium. Sir James Mansfield said, 'The sole question, as it seems to me, is, whether the arrival of these two ships could be a ground of considering the Cumberland as out of time;' and he and the other judges were of opinion, that the Cumberland could not on these facts be considered as a missing vessel, and therefore that it was no concealment not to have disclosed the arrival of the other two ships.(1)

(1) *Littledale v. Kenyon*, 1 N. R. 151. See also *Foley v. Moline*, 1 Marsh. Rep. 117; S. C. 5 Taunt. 430.

If the time of sailing be incorrectly represented so as to induce the underwriters to suppose that the vessel is not out of time, when in fact she is out of time, the policy will not bind the underwriters. In a case decided in 1742, there had been a letter received stating that the ship sailed from Jamaica for London on the 24th of November; the agent represented to the insurers that she sailed in the latter part of December. Chief Justice Lee instructed the jury that the policy was void on account of this misrepresentation.(2)

(2) *Roberts v. Fonnereau*, Park, 285.

In a case upon a policy on a vessel from Plymouth to Bristol, the broker, who had instructions that the vessel was ready to sail on the 24th of December, represented that she was in port on that day, whereas she had sailed on the 23d. Lord Mansfield said, 'This was a material concealment and misrepresentation. It is essential that the assured should represent the true state of the vessel to the best of his knowledge. If he state that as a fact, which he does not know to be true, it is the same as a warranty.'(3)

(3) *Fillis v. Brutton*, Park, 292.

Again, in effecting a policy on a voyage from the coast of Africa to the West Indies, the assured represented that the vessel was *on the coast* on the 2d of October, when he had been informed that she *sailed* on that day. Lord Mansfield said to the jury, 'The assured is bound to represent to the underwriters all the material circumstances of the ship and the voyage. If he do not, though by accident only, or neglect, the underwriters are not liable; *a fortiori* if he suppress or misrepresent from fraud.' The jury found a verdict for the underwriter.(4)

(4) *Ratcliffe v. Shoolbred*, Park, 290.

But the importance of any error in stating the time of the vessel's sailing will depend on the length of the voyage and other circumstances. A difference of a few days will make a vessel out of time in a short voyage, and yet would be of small account in a long one. In the case of a policy on a vessel from Boston to Surinam, it was represented to the insurers in New York, that she had been out about nine weeks, whereas she had in fact been out ten weeks and four days, yet the jury found a verdict in favour of the assured, on the ground that if the fact had been correctly stated, it would not have shown the vessel

(1) *Mackay v. Rhineland*, 1 Johns. Cas. 408.

to be out of time, and accordingly would not have given the insurers any reason to refuse the risk.(1)

(2) *Williams v. Delafield*, 2 Caines, 329.

(3) *Klein v. Lancaster Ins. Co. Whar-ton's Dig.* h. t. No. 22. p. 319.

The goods loaded at a previous port.

In effecting a policy upon a vessel from Cape St. François to Baltimore, the assured made the following representation; 'I have information of the vessel's sailing, and she has been out twenty-six days.' She had been out twenty-seven days, and the underwriters objected to paying the loss, on the ground that this was a misrepresentation, and also because the assured had not disclosed that another vessel had sailed after his, and arrived. The jury found a verdict in favour of the assured, not deeming the difference of a day material in that voyage. The court would not set aside the verdict; as to the other objection, they said that the insurers must know that another vessel had arrived that sailed after the one insured, otherwise the information of her time of sailing could not have been received.(2)

The agent needs not disclose a letter from his principal expressing a fear that the vessel is out of time, if the principal had no information to cause such fear.(3)

If the goods are not loaded on board at the port from which they are insured, and it does not appear by any thing in the policy that they were to be put on board at some previous port, the fact of their being put on board at some previous port, must be stated to the underwriters if it tends to increase the risk.

An insurance was made on potash, verdigris, and other commodities, 'at and from Genoa, the adventure to begin from the loading to equip for the voyage.' The vessel had lain at Genoa above five months, the goods having been put on board at Leghorn, and these circumstances, being known to the assured, were not disclosed to the insurers. Lord Mansfield said, 'The question is, whether the fact concealed was material to the risk. Who can say that no risk was run during the five months' stay at Genoa, and that no damage happened in that time. The adventure is "to begin from loading to equip for the voyage." This plainly implies that Genoa was the port of loading.' The policy was held to be void.(4)

(4) *Hodgson v. Richardson*, 3 Burr. 1477. 1 Bl. 463.

Circumstances affecting the national character of the property or exposing it to capture.

Any circumstances, within the private knowledge of the assured, affecting the national character of the property, and thereby exposing it to capture and condemnation, must be disclosed to the underwriters.

Goods were insured from Newport, in Rhode Island, to Passage, in Spain. The vessel had sailed from Laguirra to Charleston, where a part of the cargo brought from Laguirra remained on board, without being landed, though the duties upon it were secured. The vessel had been compelled, after sailing from Charleston, destined to Passage, to put into Newport for repairs, where the cargo was landed for the purpose of making the repairs, and reloaded. The vessel was captured on the voyage by the British, and the cargo was condemned on the ground that there was a continuity of the voyage from a Spanish colony to Spain. Papers were on board showing the Spanish origin of the cargo. Mr. Justice Washington said, 'That an omission to communicate the circumstance of not landing the cargo, if ma-

terial to the risk, whether by fraud or accident, vacated the policy. The underwriter takes upon himself the risk under the implied condition that he shall, as to all facts within the private knowledge of the assured, be equally informed as himself. As to public transactions, foreign laws, the course and nature of the trade, by which the risk may be affected, the underwriter is always supposed to be informed, provided they are generally known. And if generally known it is not necessary to bring a knowledge of them home to the insurers.' He was of opinion, however, that the circumstance of the cargo's not having been landed in Charleston, though many cargoes were carried in this way, was material, and that the policy was void on account of its not being disclosed.(1)

(1) *Kohne v. Ins. Co. N. A. Condry's Marsh. 473. n.*

Chief Justice Tilghman, speaking of the same facts, said, 'The question is whether the underwriters had any reason to suppose that the goods had not been landed in the United States for the purpose of importation, and whether the not landing them would expose the ship to greater danger of capture. Upon these points I see no reason to doubt.' He and the other judges were of opinion that the policy was void.(2)

(2) *Kohne v. Ins. Co. N. A. 6 Bin. 219.*

Where insurance was effected on a vessel and cargo from the United States to Spain, warranted neutral, Spain then being at war with Great Britain, and the assured informed the underwriters that five Spaniards with passports were going passengers in the vessel, but did not inform them that the goods had been brought to New York by a Spaniard who had sold them there; his not disclosing this circumstance was held not to vitiate the policy. The court said, 'If according to any established adjudications of the belligerent courts, generally known, certain circumstances become grounds of condemnation, though in opposition to the law of nations, those circumstances, if known to the assured, ought to be disclosed. But they did not know that the assured was bound to anticipate every possible ground of suspicion.'(3)

The goods purchased of a belligerent.

Facts that may cause condemnation though unauthorized by the law of nations.

(3) *Marshall v. Union Ins. Co. Condry's Marsh. 473. n.*

A ship warranted Portuguese, but having an English supercargo on board, being captured, was condemned in France as English, on account of her having an English supercargo, which circumstance, according to a French ordinance, was evidence of the hostile character of the vessel, there being war at the time between England and France. Lord Mansfield and the other judges were of opinion, that the policy was not vacated by reason of the assured's not stating this fact to the underwriters, it not appearing that the assured had any knowledge of the ordinance.(4)

A belligerent subject supercargo of a neutral ship.

(4) *Meyne v. Walter, Park, 306; Marsh. 397.*

If the property is accompanied with a letter of instructions exposing it to capture and condemnation, according to the well-known decisions of a foreign court of admiralty, Mr. Justice Washington was of opinion that the circumstance should be made known, 'and it was immaterial whether those decisions were consistent with the law of nations or not, as the danger of capture was the same.'(5)

A document exposing the cargo to capture.

(5) *Sperry v. Del. Ins. Co. Condry's Marsh. 473. n.*

National character of the assured.

(1) *Campbell v. Innes*, 4 B. & A 423. But see *Hodgson v. Mar.*

Ins. Co. 5 Cranch, 100. Supr. 61.

(2) *Duguet v. Rhinelander*, 1 *Caines' Cas. in Err.* XXV.

2 *Johns. Cas.* 478. But see *S. C. 1 Johns. Cases*, 360.

Contraband goods belonging to other shippers.

(3) *Murray v. Unit. Ins. Co.* 2 *Johns. Cas.* 168.

(4) *Bowne v. Shaw*, 1 *Caines*, 489.

(5) *Depeyster v. Gardner*, 1 *Caines*, 492.

Contraband goods insured.

(6) *Seton v. Low*, 1 *Johns. Cas.* 1; *Juchel v. Rhinelander*, 2 *Johns. Cas.* 120; *Rhinelander v. Juchel*, 2 *Johns. Cas.* 487.

(7) *Barker v. Blakes*, 9 *East*, 283.

The national character of the property is generally a subject of warranty and not of representation. It has however been held in England that if the national character of the assured is not known to the insurers, and is such as to expose the property to more than ordinary danger of capture, it must be disclosed.

It was held in New York that the assured was not bound to disclose to the insurers that he had emigrated from France to the United States, during the war pending at the time between France and England.(2) But it has been held that the interest of a subject of a belligerent country, as *cestui que trust*, in a ship insured in the name of a neutral, must be disclosed.(3)

The owners of the ship procured insurance of goods shipped by themselves, which they warranted 'against loss by capture or detention for or on account of any illicit trade, or trade in articles contraband of war,' and no part of the property insured was contraband; nor did they ship any contraband goods on their own account, but they shipped goods of this description as agents for another person, on board of the same vessel, which circumstance was known to the insurers, and therefore could not affect the policy which was held to be valid.(4)

The captain for the same voyage insured his commissions on 'lawful goods,' and the goods, on which the commissions were to accrue, answered to that description. He did not disclose that other goods contraband of war were shipped for the same voyage; nor was this circumstance known to the insurers. The court were of opinion that there was no concealment, 'for he was not owner, but only master, and therefore could not refuse to take the goods.'(5) This reason evidently applies only to a shipment of contraband goods made after insurance has been effected by the captain, or to a shipment of articles not known to him to be contraband of war at the time of effecting his policy. The court does not, however, expressly make any such distinction.

But according to other decisions of the same court, it seems that neither the captain nor owners are bound to disclose that articles contraband of war, and not being a part of the goods insured, constitute a part of the cargo. In the case of insurance on 'all lawful goods,' the goods were detained as contraband of war, and a part of them condemned as such in a British court of vice-admiralty; it was held that the circumstance of the goods being contraband of war, need not be disclosed to the underwriters.(6) The circumstance that the goods insured are contraband of war, is certainly more material, than that other goods, contraband of war, are on board of the same vessel.

The assured on goods being an American and neutral, did not disclose to the British underwriters, in the time of a war between France and Great Britain, that some French property was shipped by the same vessel, by which the vessel was liable to detention by British cruisers. But the policy was not affected by not disclosing this fact. The circumstance does not appear to have been known to the assured.(7)

In effecting a policy on freight from Leghorn to Smyrna and back to Leghorn, the assured did not disclose that the cargo belonging to a subject of France, then belligerent, was covered as the property of Harrod, the supercargo, a neutral. Mr. Justice Sewall, giving the opinion of the court, said, 'Where the insurance is of the freight of a neutral vessel, there is no implied agreement that the cargo shall be neutral; for a neutral vessel may be lawfully employed in carrying the property of a belligerent. When the voyage commences in a foreign country under a supercargo who is at liberty to take the property of neutrals or belligerents, the assured may be innocently silent, especially when he is not questioned upon the probability of the event. But when the assured has intelligence which shows the risk to be under circumstances the most unfavourable to the underwriters, and it is known that his vessel is carrying a cargo that is not neutral, intelligence of this nature certainly ought to be disclosed. If the employment was known to the assured, including especially the agreement of the supercargo to cover the property of the belligerent by false papers, this certainly ought to have been disclosed. Such intelligence was material, and the concealment of it was injurious to the underwriters, who might justly avoid a contract thus obtained.'⁽¹⁾

(1) *Stocker v. Mer. F. & M. Ins. Co.* 6 Mass. Rep. 220.

Facts material to the risk must not only be disclosed to the underwriter but they must be *fully* and *fairly* stated, so that he may judge of the degree of risk.

Facts must be fully and fairly disclosed.

Where the assured knew that there had been a 'violent storm at Norfolk, about eleven hours after the vessel sailed' from that port, and he represented to the underwriters that 'there had been blowing weather and severe storms on the coast, after the vessel had sailed,' without mentioning the particular storm; a majority of the judges of the Supreme Court in New York held it to be a concealment. Thompson J. giving their opinion said, 'Unless the assured intended to suppress some information he had relative to this weather, we can see no reason why he did not communicate the information he had actually received. From the general communication given, the underwriter might be induced to calculate that the storm had not reached Norfolk; or that the vessel had been out so long as not to be endangered by it. The representation was not made in quite as forcible terms as those in which the information was received.' But Chief Justice Lewis dissented; he said, 'It is rather too much to say the communication to the underwriter must be in the very express words in which the assured has received it. The information was such as to give the insurer reason to think the risk was increased. It comprehended, in my opinion, every thing that was necessary.'⁽²⁾

Storm to which the ship may have been exposed.

(2) *Ely v. Hallett*, 2 Caines, 57. See *Moses v. Del. Ins. Co.* Whart. Dig. 319. h. t. No. 18.

It is sufficient to represent facts, and the assured may be silent as to any speculations or apprehensions that may be grounded upon them; as, where the owners of the *Rising Sun*, then at Riga, received a letter informing them 'that the order lately received there to send the papers of all vessels that should

arrive, to St. Petersburg, had produced a great sensation on account of the detention which it would occasion; that the Rising Sun must share the same fate, and that her papers had been sent to St. Petersburg; and the broker did not show the letter to the underwriters, but stated that 'the ship's papers were sent to St. Petersburg for examination;' Lord Ellenborough said to the jury, 'The assured are only bound to communicate facts. The broker did communicate the fact of the ship's papers being sent to St. Petersburg for examination; he was not bound to communicate the sensations and apprehensions which this fact produced at Riga.'(1)

(1) Bell v. Bell, 2 Camp. 475.

The assured had received letters from the master of the ship at St. Domingo, by which he was informed that the ship would be ready to sail for France *between the fifth and tenth* of October. It was represented to the insurers that the ship would sail in October. It was the opinion of witnesses, and seems to have been that of Lord Kenyon, that this was not a fair disclosure of the intelligence.(2) A representation that the vessel was expected to be loaded between the 13th and 20th of September, when she was known to have been loaded on the 13th, was held in Scotland to be a misrepresentation.(3)

(2) Chaurand v. Angerstein, Peake, 43.
(3) Stewart v. Morrison, Mil. 59.

An American insured against American capture.

A ship and cargo being insured in England from that country to the United States 'against all risks, American capture or seizure included,' the broker omitted to disclose that the property belonged to Americans. Chief Justice Abbott said, 'An American subject, to whom a ship and goods are consigned in America, if he knows that he is insured against American capture and seizure, may not only omit to take proper means to prevent loss, but may possibly facilitate it by giving information to his own government upon the subject.' The policy was accordingly held to be void, on the ground that the insurers ought to have been informed that the property belonged to Americans.(4)

(4) Campbell v. Innes, 4 B. & A. 423.

It is immaterial in what way the insurer is informed of facts.

(5) Bowne v. Shaw, 1 Caines, 489.

The assured must make true answers to inquiries.

As the assured is excused from disclosing a usage, or the uniform regulations of the trade to which the insurance relates, which circumstances the insurer is *presumed* to be acquainted with, *a fortiori*, the contract will not be vacated by the assured's inadvertently omitting to represent any fact, however material to the risk, of which the insurer can be proved to have been informed in any other way.(5)

It appears from many of the preceding cases that the assured must make true answers to the inquiries of the insurer respecting circumstances affecting the risk. Such inquiries may make it necessary that the assured should disclose facts respecting which he might otherwise be silent. It has already appeared that circumstances affecting the seaworthiness of the ship need not be disclosed in the first instance by the assured, but he must make a true representation of such facts in reply to the inquiries of the insurer. If the assured is inquired of as to the age of the ship, and the place where she was built, he must answer the inquiries truly.(6)

(6) Popleston v. Kitchen, Whart. Dig. 319. h. t. No. 23.

This principle is not limited to the subjects of implied warranties. Insurance being made for a voyage upon which the

ship had sailed before the policy was made, without a disclosure of the fact that the ship had sailed, the insurer objected that this was a concealment of a material fact. The court said, 'If the underwriter wanted to know whether the ship had sailed, he ought to have inquired,'⁽¹⁾ thereby implying very distinctly that such an inquiry would have made it obligatory on the assured to give a true answer.

(1) *Fort v. Lee*, 3 Taunt. 381.

The same facts may be material or not according to the particular circumstances. The time of the vessel's sailing is material and must be disclosed, if known to the assured, where the vessel appears to be out of time. So in determining whether the vessel is out of time; a few days more or less, from the time of the vessel's sailing, are of greater importance in a short voyage, than in a long one.⁽²⁾

Whether a fact is material depends on the particular circumstances.

(2) *Macdowall v. Fraser*, Doug. 260.

In many instances it depends wholly on the particular circumstances connected with a general fact, whether that fact is material to the risk.

Goods were insured 'at and from Heligoland to a port or ports of discharge in the Baltic,' on the 8th and 13th of August, without disclosing that the ship, at that time, lay in the Thames. She did not sail for Heligoland until the 27th of that month. Lord Ellenborough said, 'When a broker proposes a policy to an underwriter on a ship at and from a certain place, it imports either that the ship is there at the time, or shortly will be there; for if she is only to be there at a distant period, that might materially increase the risk. But it has never been understood that the terms of such a policy necessarily imported that the ship was at the place at the very time, so as to make the assured guilty of deception if she were not. It was a question for the jury, whether the intervening period materially varied the risk in this instance.'⁽³⁾

(3) *Hull v. Cooper*, 14 East, 479.

The rate of the premium has been considered a circumstance of some importance in determining whether a fair representation has been made. If the risk appears to have been known by the assured, at the time of insuring, to be extraordinary, and yet only the ordinary premium for the voyage was given, it affords some presumption of more or less weight against the fairness of the representation.⁽⁴⁾ Upon the same principle an extraordinary premium is a ground of presuming that the risk was represented to be extraordinary.⁽⁵⁾

The rate of premium a criterion as to representation.

(4) *Bridges v. Hunter*, 1 M. & S. 19.

(5) *Freeland v. Glover*, 7 East, 457.

Companies that insure against fire usually adopt certain rules respecting representations, requiring the assured to make known of what materials a building proposed to be insured is constructed, for what purpose it is occupied, and what kind of buildings are situated near to it; whether the goods proposed for insurance are held in trust; what kind of goods they are; the description and situation of the building in which they are stored, and other circumstances showing the extent of the risk; and these rules are made public by annexing them to the policy or otherwise. If these rules are made sufficiently public, the assured is bound to take notice of them, and to make a true and full repre-

Policies against fire

sentation of the circumstances, which he is required by such rules to disclose.(1)

(1) *Newcastle Fir. Ins. Co. v. Macmorran*, 3 Dow, 255.

As far as the published rules of the company do not specify the facts to be disclosed, the representations required to be made will be determined by the general principles already laid down,—facts material to the risk and not known to the insurer, and which he cannot reasonably be presumed to know, must be represented.

(2) *Bufe v. Turner*, 2 Marsh. Rep. 46 ; 6 Taunt. 338.

A person resident at Heligoland wrote, on Saturday, the 11th of July, to the directors of an insurance company in England, for insurance 'on a warehouse situated in the town of Heligoland,' without stating that the warehouse was separated only by one other building from another warehouse which had been on fire on the same day. The fire was supposed to have been extinguished by eight o'clock in the evening, but it was considered necessary to watch the premises all night. The fire broke out again on Monday morning following, and consumed, among other buildings, the warehouse insured. This was considered to be a material concealment.(2)

Policies on lives.

The same general principles as to representations or concealment, are also applicable to insurances on lives. The assured must make a fair and full disclosure of all the facts within his private knowledge, and which the underwriter is not presumed to know, which might justly be supposed to induce the underwriter to demand a higher premium or refuse the risk. Where the broker said 'he would not warrant; but from the account he had received he believed it to be a good life;' Lord Mansfield said, 'The broker does not pretend to any knowledge of his own, but speaks from *information*.' It was held not to be a representation that the subject was a good life.(3)

(3) *Stackpool v. Simon*, Park, 648. Marsh. 772.

In effecting a policy on the life of Elizabeth Swayne, the broker did not state that she was a prisoner for debt, occupying, however, a large airy room, in the county goal of Fisherton Anger, in a situation perfectly healthy. She was about sixty years old and in good health. The court said, 'If the imprisonment were a material fact, the keeping it back would be fatal;' but they thought it depended upon the particular circumstances, whether this fact was material or not.(4)

(4) *Huguenin v. Rayley*, 6 Taunt. 186.

Section 3. *The Withdrawing or Waiver of a Representation.*

(5) *Bize v. Fletcher*, Doug. 235.

An express warranty or stipulation including a fact represented, or inconsistent with it, will control and supersede the representation, since the written agreement, as far as its express provisions extend, is conclusive proof of the conditions on which the contract is made. A ship being insured 'to all or any ports or places' beyond the Cape of Good Hope, it was alleged that the assured had represented that she was going 'to Pondicherry and China.' Lord Mansfield and the other judges held that any such representation was superseded by the description of the voyage in the policy.(5)

If a policy be made in behalf of 'whom it may concern,' the underwriter cannot object that he was not informed who were interested, for by subscribing the policy he has agreed to insure any one who may be lawfully interested. In the case of a policy of this description made in New York, the person who effected it resided there, but one of the part-owners resided at Curraçoa, at that time a belligerent colony. It was insisted that this fact ought to have been disclosed. Mr. Justice Kent said, 'The insurers took upon themselves the risk of property whether belligerent or neutral.'⁽¹⁾

Where the voyage, as represented in the proposal for insurance, was not worth so high a premium by five or six per cent as that on which the ship actually sailed, yet this representation was waived by the description of the voyage in the policy.⁽²⁾

In the case of a policy on the 'Spanish brig New Constitution;' the description imported and warranted that the brig was in fact Spanish; it availed nothing that the underwriters knew she was only *ostensibly* Spanish, for it was agreed in the written instrument what her national character should be.⁽³⁾

But there is a distinction in this respect between an express and an implied stipulation or warranty. It has already appeared that the assured must make true answers to inquiries relating to the subject of an implied warranty, which would be futile unless the contract were to be affected by the representations made in reply to such inquiries. 'As far as a representation extends,' says Mr. Justice Platt, 'an implied warranty ceases.'⁽⁴⁾

The question, whether a usage is controlled by a representation or will supersede it, has already been suggested.⁽⁵⁾ This question seems to depend in some degree upon another, namely, whether a usage, and the course of the trade, are to be considered as equivalent to an express part of the policy. If the construction be, as Lord Mansfield said, the same 'as if the point of usage were inserted in the contract in terms:'⁽⁶⁾ then it should seem, if his observation is to be adopted in its strict and literal meaning, that the assured will be bound by the usage, though he may have represented to the insurers that he intended to depart from it. But Lord Mansfield was speaking of a case where there was no representation as to the point of usage, and to apply his remark to any other case might be forcing it beyond the sense in which it was intended. It appears by some cases that a usage may be qualified and restrained by a representation, but only in such manner that the necessary and plain import of the words of the policy shall remain unimpaired. Thus where the captain was limited by his orders to one out of three courses of the voyage, when it was the usage to leave it to the discretion of the captain to choose either course at the dividing point, the judges said the orders 'ought to have been communicated to the underwriters,' and 'disclosed' to them; 'they would perhaps have required a larger premium, or not have subscribed';⁽⁷⁾ by which it seems to be implied that a *representation* of the fact that the captain was limited to one course, would have given the assur-

(1) *Elting v. Scott*, 2 Johns. 157.

(2) *Vandervoort v. Smith*, 2 Caines, 155.

(3) *Atherton v. Brown*, 14 Mass. Rep. 152. See also *Pickering v. Dowson*, 4 Taunt. 779.
(4) *Walden v. New York Firem. Ins. Co.* 12 Johns. 135.
(5) *Supr.* 9.

(6) *Mason v. Skurray*, Park, 191.

(7) *Middlewood v. Blakes*, 7 T. R. 158.

ed a right to recover a loss; neither of the judges said any thing of inserting the circumstance of the orders in the policy. The case seems to imply that a representation would have discharged the assured from the obligations arising from the usage. But the question appears to be involved in some difficulty and uncertainty.

Neglecting to make inquiries may be a waiver of information.

Instances have occurred in the preceding cases where the insurer, by omitting to inquire respecting circumstances relating to the seaworthiness of the ship, the national character of the property, and its character as contraband of war or not, and respecting the time of the vessel's sailing, has been held, by so doing, to have waived any information concerning those facts, in respect to which the assured is not required in the first instance to make any disclosure.

If the facts disclosed suggest distinctly that there are other facts relating to the risk, which are not particularly stated, the insurer may, by neglecting to make inquiries, waive the right of being particularly informed respecting such other facts. Goods were insured on board of the ship *Neptune*, 'lost or not lost, from twenty-four hours after her arrival at her first place of trade on the coast of Africa; during her stay on the coast; and from thence to Liverpool.' Before the policy was effected the assured had received two letters from the person acting in the capacity of captain. In the first letter, dated at *Bambia* on the 15th of February, 1800, he stated that the crew had 'been in a dangerous fever;' that 'close to the river *Danger*, three canoes came off, and the blacks began to be very impudent; they took a cutlass from the captain, and killed him and one of the landsmen, and the rest of the people were all very much wounded. There are only five left alive in the ship, and I cannot get one man here. We are all very sickly. The blacks plundered the ship of all our clothes, and all our stores are done.' The second letter was dated at *Gaboon River*, the 21st of April following; in which he said, 'We arrived in *Gaboon River* on the 24th of March. The natives finding us weakly handed, and our goods taken from us, do as they please. I have nine men on board now. I made mention of the ivory, palm oil, &c. in my last letter. I do not expect to get all my wood till the latter part of next month; then you may expect my sailing.' This last letter only was shown to the underwriters. Lord *Ellenborough* said, 'No underwriter is so little conversant with the African trade, as not to know that ships engaged in it always continue for some time on the coast. The assured laid before the underwriters a letter dated on the 21st of April, by which it appeared that the ship arrived in *Gaboon River* on the 24th of March preceding, and had then on board a part of her homeward cargo. It was open to them to inquire, if they thought it material, whether that were her first arrival, or how long before she had arrived on the coast. The fair inference from the letter is, that she had been upon the coast for some time, for the writer refers to different articles of the cargo, of which he had made mention in his last letter. If then the underwriters wished for further information

as to prior circumstances, they should have asked for that letter. The assured disclosed every thing which he knew as to the existing state of the ship at the time; it is a true statement of its then actual situation, and it suggests a former communication, so as to put the underwriters upon further inquiry, if they thought it material.' Lawrence, J. said, 'If the underwriters wished for further information, it was their own fault that they did not call for it, when the letter they saw referred to a former letter.'(1)

(1) *Freeland v. Glover*, 7 East, 457.

'A representation' says Lord Ellenborough, 'will be binding, unless it be afterwards withdrawn.'(2) The assured may at any time before the policy is signed, withdraw any representation previously made,(3) by giving the underwriters explicitly to understand that he was mistaken in regard to the facts represented, or that he will not be held to a compliance with what he had verbally promised. Lord Ellenborough held that the assured virtually withdrew a representation made by him at the time of signing the slip, by making another and different representation at the time of signing the policy. He said, 'The first conversation was qualified and controlled by what followed.'(4)

A representation may be withdrawn.

(2) *Edwards v. Footner*, 1 Camp. 530.

(3) *Carter v. Boehm*, 3 Burr. 1905.

(4) *Edwards v. Footner*, 1 Camp. 530.

Section 4. *Compliance with a Representation.*

It is sufficient that a representation is equitably and substantially complied with, and not requisite that the facts should be literally and precisely as they were stated.(5) If the existing facts or intelligence on which the representation is made, be on the whole as favourable to the risk as they were represented to be, and correspond in general to the representation, the insurers have no ground of complaint, though the statement was not literally and minutely correct. Where it was represented that the vessel would sail in ballast, but the captain, without the owner's knowledge, took on board a cask of shoes and ten barrels of gunpowder; Kent, C. J. said, 'The representation of sailing in ballast was merely stating that the vessel would not be exposed to the sea perils attending a loaded ship, and was substantially performed.'(6)

(5) *De Hahn v. Hartley*, 1 T. R. 343; 2 T. R. 186.

(6) *Suckley v. Delafeld*, 2 Caines, 222.

It being represented that the vessel would sail with twelve guns and twenty men, she sailed with nine carriage guns and six swivels, and fourteen men, and seven boys. Boys were considered to be men within the description in the representation, and as the force appeared to be equivalent to that represented, though not the same, the contract was held to be valid.(7)

The ship to have twelve guns and twenty men.

(7) *Pawson v. Watson*, Cowp. 785; Doug. 12. n.

A vessel, French built, was represented to be owned by American citizens, and to have on board an original bill of sale, or an attested copy of it, and such a bill of sale was on board, but on the ship's being captured was not produced, and the captain, on his examination before the Admiralty court at Halifax, denied that he had any such bill of sale on board. It was held that the representation was material, and had not been complied with. Kent, J. said, 'It would be absurd to suppose that the

The ship to have on board an original bill of sale.

- (1) *Murray v. Alsop*, 3 Johns. Cas. 47. See 1 Rob. 103. The ship represented to be neutral.
- (2) *Dawson v. Atty*, 7 East, 387.
- (3) *Vandenheuvel v. Church*, 2 Johns. Cas. 173. n.
- (4) *Alsop v. Coit*, 12 Mass. Rep. 40. A good life.
- (5) *Ross v. Bradshaw*, 1 Bl. 312.
- bill of sale on board, in a concealed situation, and never to be used, fulfilled the intention of the parties. The only question then is, whether the bill of sale is a material paper. (1)
- A ship represented to be neutral must have the documents necessary to prove its neutrality. (2) A representation that a ship was neutral, was held in New York to be 'equivalent to a warranty,' (3) and it accordingly requires that the ship should be owned, documented, and navigated, in conformity with the representation.
- It being represented that a ship would 'sail as soon as the frigates, calculating to take advantage of their protection,' and she sailed before them; this was held not to be a compliance with the representation. (4)
- At the time of effecting a policy on the life of Sir James Ross, he was represented to be 'a good life.' It appeared that he was subject to great inconvenience and a partial palsy, in consequence of a wound received at the battle of La Feldt. But as the wound appeared to be only inconvenient, and not dangerous, the representation was considered to be true. (5)

Section 5. Effect of a Concealment or Misrepresentation.

One of the conditions on which the underwriter subscribes the policy is, that he has been previously informed of all the material facts within the knowledge of the assured, and not presumed to be known to himself; and it appears from the preceding cases that a non-compliance with this condition—a concealment or misrepresentation—annuls his subscription and prevents the contract from being obligatory on him.

- If a material fact be misrepresented or suppressed, the contract will not bind the underwriters, although such fact related to only a part of the subject insured, (6) and though no loss arise from the circumstance concealed or misrepresented. In the case above cited, of an insurance from Berderygge to London, where the broker neglected to inform the insurers that the vessel was ready to sail on the first of December, from which the insurers might have supposed that she was out of time, she did not in fact sail until the 24th of that month, and therefore had the broker known and disclosed the actual facts, the premium would have been the same. But still the policy was void, for the insurers had a right to the information, and subscribed upon the condition of its being disclosed. (7).

- (6) *Marshal v. Un. Ins. Co.* Whart. Dig. 319. h. t. No. 19.
- (7) *Willes v. Glover*, 1 N. R. 14. See Anon. Skin. 337.
- In the case of a policy upon the ship *Davy*, a letter had been received in which the writer said, 'On the 12th I was in company with the *Davy*; at twelve at night lost sight of her all at once; the captain spoke to me the day before, that she was leaky, and the next day we had a hard gale.' This information was not communicated to the insurers. The ship in fact continued on her voyage until the 19th of the same month, when she was captured by the Spaniards. Chief Justice Lee 'thought it not material that the loss was not such a one as

the letter imported; for those things are to be considered in the situation of them at the time of the contract, and not to be judged of by subsequent events.'(1)

(1) *Seaman v. Fonnereau*, 2 Str. 1183.

A broker knowing that a ship, having on board a part of the goods insured, was reported to have been seen at sea 'deep and leaky,' did not disclose this information to the underwriters. Though it was testified that the ship was not deeply laden or leaky, the suppression of the information defeated the contract.(2)

(2) *Lynch v. Dunsford*, 14 East, 494; *Lynch v. Hamilton*, 3 Taunt. 37.

Though material facts are suppressed or misrepresented through mistake or forgetfulness, and without any fraudulent purpose, it has the effect to defeat the contract.(3)

(3) *Bridges v. Hunter*, 1 M. & S. 15.

But according to one case there may be instances in which a concealment or misrepresentation may not avoid the policy. A ship insured 'at and from Jamaica' was there in July, whence the captain wrote in August to the owner in England, omitting to mention that the ship had struck upon a rock in Manchineal harbour, though she had been got off, before the captain wrote, without appearing to have suffered material damage. The policy was effected after the captain's letter had been received, and the circumstance of the ship's having struck, was not made known to the insurer. It afterwards appeared that the ship had been very considerably injured by the accident. Lord Ellenborough said, 'By the captain's protest there is evidence that he suspected the ship must have sustained damage. If it were but a dubious case he ought to have communicated it. If the captain might be permitted to wink at these circumstances without hazard to the owners, the latter would in such cases instruct their captain to remain silent, by which means the underwriter would incur the certainty of being liable for antecedent loss. To prevent such a consequence, and considering that what is known to the agent is impliedly known to the principal, I think that no mischief will ensue from holding that the antecedent damage was an implied exception out of the policy. If the principle be new, it is consistent with justice and convenience.'(4) The policy was accordingly held to be valid in respect to the other perils and losses insured against.

Concealment of an antecedent loss.

(4) *Gladstone v. King*, 1 M. & S. 35.

This case does not come within any principle that has been distinctly recognised in any other. If it can be reduced to any general principle, it must be an exception to the rule that a concealment avoids the policy. The fact that the ship had struck, could not, in respect to the subsequent risks, be of any importance, except in relation to seaworthiness, in regard to which the assured is not required to make any representation. The case amounts to this, then, that the concealment, without fraud, of an antecedent loss, coming within the terms of the policy, but not affecting the other risks and perils insured against, does not avoid the policy, but only operates to exempt the insurers from the payment of such loss. It would be inconsistent with many of the preceding cases to go further than this, and say, that the concealment or misrepresentation, without fraud, of a fact which could not possibly affect all the risks in the policy,—

as the fact of national character, for instance, does not affect sea-risks,—will not avoid the policy, but leave it valid in respect to the risks not affected, and throw upon the assured those that are affected, by the fact concealed or misrepresented. But if the question were new, reasons of some weight might be urged in favour of adopting such a principle.

Representation of a fact subsequent to the commencement of the risk.

(1) *Middlewood v. Blakes*, 7 T. R. 164.

In the case of the captain's being restricted to one out of three courses, Mr. Justice Lawrence said, 'if the ship had been captured before she took the northern course, I should have thought that the assured would have been entitled to a verdict.'⁽¹⁾ If this was a question of concealment, as the court appeared to consider it, another exception is furnished to the general rule, that a concealment makes the policy void from the beginning. Suppose the assured should represent that the ship would take an armament as a letter of marque at some intermediate stage of the voyage, and this representation should not be complied with; it would seem to afford no reason why the insurer should not pay a loss occurring before the non-compliance. If the insurers are liable for such antecedent loss, it is upon the principle that a representation does not avoid the policy until it is falsified, and accordingly that a misrepresentation or concealment, which does not relate to the beginning of the risk, will make the policy void only in respect to a part of the voyage.

CHAPTER VIII.

IMPLIED WARRANTIES AND CONDITIONS.

Section 1. What Warranties and Conditions are implied.

WHERE by the mere act of effecting insurance, the assured is presumed to give the underwriters to understand that certain facts are true, or certain acts shall be done, relating to the risk, this is an implied warranty. It is distinguished from a representation, principally, by the circumstance, that a representation must generally, at least, be expressed, either in writing or verbally, whereas an implied warranty is made by the mere act of effecting the insurance. The production of the policy by the assured is a proof of all the implied warranties and conditions on which it was made, but a representation or concealment requires other proof, which must be produced by the underwriter.

The effect of a misrepresentation involves the principle of an implied warranty.

The effect of a misrepresentation or concealment involves the principle of an implied warranty or condition; it avoids the policy because there is an implied agreement of the assured to make a fair disclosure of the circumstances affecting the risk, and the insurer subscribes upon the condition that he has complied with this agreement.

By effecting a policy, whether it be on the ship, freight, or cargo, or the commissions or profits to accrue upon the cargo, the assured is always understood to warrant that the ship is seaworthy, or that the materials of which the ship is made, its construction, the qualifications of the captain, the number and description of the crew, the tackle, sails, and rigging, stores, equipment and outfit, generally, are such as to render the ship in every respect fit for the voyage insured.⁽¹⁾ If the ship be not such as the assured is understood, by effecting the policy, to warrant, the condition on which the liability of the underwriter depends is forfeited, though the unseaworthiness arises from some latent defect which the assured could not have discovered or prevented.^(a)

The policy implies the seaworthiness of the ship.

(1) *Lee v. Beach, Park*, 342; *Marsh.* 160; *Oliver v. Cowley, Park*, 343; *Marsh.* 161; *Warren v. Unit. Ins. Co.* 2 *Johns.* 231.

Lord Redesdale said, 'Unless the assured were bound to take care that the vessel was in every respect seaworthy, the consequence would be to render those chiefly interested, much more careless about the condition of the ship and the lives of those engaged in navigating her.'⁽²⁾

(2) *Wilkie v. Geddes*, 3 *Dow*, 60.

It has been held also that the policy implies a warranty that the vessel shall be documented and navigated in conformity to its national character, and that the voyage shall be conducted in compliance with the laws and treaties of the country where the policy is made, or to which the vessel belongs, or of which the assured is a subject, and also in compliance with the law of nations.

Implied warranty of national character and the legal conduct of the voyage.

Section 2. Seaworthiness of the Ship.

The policy implies the seaworthiness of the ship. To render a ship seaworthy it must be staunch and of sound materials, or rather it must be sufficiently staunch and sound for the employment and situation intended by the insurance. A ship of which the 'timbers were decayed and the iron work wrought loose' was considered not to be seaworthy.⁽³⁾

The ship must be of sufficient materials and construction.

(3) *Douglas v. Scougall*, 4 *Dow*, 269.

The ship must be of a proper construction. A vessel constructed without knees was held not to be seaworthy for a foreign voyage.⁽⁴⁾ The question occurred in Pennsylvania whether the want of cabin doors, for which sliders were, or had been substituted, to close the entrance to the cabin, and the want of a tarpawling covering of the hatches, make a vessel unsuitable for the navigation of Lake Erie; *Tilghman, C. J.* seemed to be of opinion that these circumstances did not make the vessel unfit for this service.⁽⁵⁾

(4) *Watt v. Morris*, 1 *Dow*, 32.

(5) *Bell v. Reed*, 4 *Bin.* 127.

It was said by Mr. Justice Radcliff that 'a vessel is not seaworthy, unless she be in a condition to carry a full cargo.'⁽⁶⁾ But this remark must be limited to the particular subject under consideration, the question being whether the vessel was seaworthy for the purpose of carrying on to New York a cargo

The ship not able to carry a full cargo.

(6) *Abbott v. Broome*, 1 *Caine*, 302.

(a) A provision of the policy is mentioned in one case that 'any insufficiency of the ship not known to the assured should not prejudice the insurance.' *Vallejo v. Wheeler, Cowp.* 148.

brought from India. It is a compliance with this warranty if the ship is in a suitable condition to carry the cargo put on board, or intended to be so, it being sufficient if the vessel is fit for the service on which she is employed.

The needle of the compass drawn out of its course.

In case of a vessel's being run upon a rock in going out of Boston harbour, in consequence of the needle of the compass being drawn out of its direction two or three points, by an iron fastening near which the compass was placed, which defect could however easily be removed, the insurers objected to paying the loss, on the ground that this circumstance rendered the vessel unseaworthy. It appeared by the testimony of sundry witnesses, that notwithstanding the utmost care on the part of the owners and master, iron bodies will sometimes be brought so near the compass as to cause a variation of the needle, and there being no negligence in this case, the court seemed to acquiesce in the opinion of the witnesses, that the circumstance did not render the vessel unseaworthy.(1)

(1) *Stanwood v. Rich*, S. J. C. Mass. Suff. Nov. 1817.

The ship must be well provided with sails, tackle, &c.

The ship must be sufficiently furnished with sails, tackle, rigging, cables and anchors. A vessel was considered not to be seaworthy, of which 'the maintop-gallant-sail and studding-sails were extremely rotten and unserviceable,' in consequence of which deficiency she fell behind the convoy and was lost. Lord Ellenborough said, 'It is not enough that a ship is supplied with such sails as are essential to her safety from the perils of the sea. An underwriter has a right to expect that she shall be so equipped with sails that she may be able to keep up with the convoy, and get to her port of destination with reasonable expedition.'(2) So a vessel was considered to be unseaworthy, of which the best bower anchor and the cable of the small bower were defective.(3)

(2) *Wedderburn v. Bell*, 1 Camp. 1.
(3) *Wilkie v. Geddes*, 3 Dow, 57.
(4) *Fontaine v. Phoen. Ins. Co.* 10 Johns. 58.

The ship must be well supplied with provisions and stores.

Sufficient stores and supplies are requisite to seaworthiness. A vessel not properly supplied with fuel and candles was held not to be seaworthy.(4) If a medicine chest is a part of the usual outfit of the voyage insured, it is questionable whether the ship is seaworthy without one.(5)

(5) *Woolf v. Claggett*, 3 Esp. 257.
(6) *Tait v. Levi*, 14 East, 481.
(7) *Walden v. Firem. Ins. Co.* 12 Johns. 133.

Seaworthiness depends in part upon the capacity of the captain and his skill in his profession. The court was inclined to hold a vessel not to be seaworthy, the captain of which, from ignorance of the coast, mistook Barcelona for Tarragona.(6)

Mr. Justice Platt, giving the opinion of the court, said, 'I consider the contract to be essentially this; that the assured shall, in good faith, employ a captain of competent skill and general good character.'(7)

A competent crew is requisite.

A competent crew is requisite to seaworthiness. It was held in one case that a vessel was not seaworthy for the voyage insured, on account of the crew's being shipped for a port of destination different from that to which the vessel was insured, and out of the course of the voyage described in the policy. Goods were insured from Wilmington in North Carolina, to Falmouth in England. It seems that the men, or a part of them, were shipped for a voyage from Wilmington to New York. Mr. Justice Kent said, 'The captain was under a moral inability to go

to Falmouth for want of seamen, and this was equivalent, in force and effect, to a physical incompetency to perform the voyage.'⁽¹⁾ But when the loss happened in this case, the ship was on the common course to both the ports of New York and Falmouth, not having passed the dividing point, and had a competent crew. It does not appear why the necessity the captain was under to violate his agreement with the men, in order to pursue the voyage within the terms of the policy, should be a violation of the contract between the assured and the underwriters. The captain must, to keep his agreement with the men, have deviated from the voyage insured, but the underwriters could not be affected before the deviation took place.

(1) *Silva v. Low*, 1 Johns. Cas. 198.

A vessel of about thirty-five or forty tons burden, with three sails, was considered not to be seaworthy for a voyage from New York to Edenton in South Carolina, with no other crew than the master and one seaman.⁽²⁾

(2) *Dow v. Smith*, 1 Caines, 32. See *Hunter v. Potts*, Selw. 907. n.

A ship engaged on a whaling and sealing voyage, and having a letter of marque, was insured with or without letters of marque, with liberty to chase, capture and man prizes, and see them into port, the risk to commence on the 1st of August, 1806. The crew had suffered by death and desertion during the voyage, and, at the time of the commencement of the risk under the policy, 'did not exceed nine men and a boy,' there being on board also five Spanish prisoners. With this crew the vessel could not pursue the whale fishery and keep a proper guard over the prisoners, but the crew was sufficient for the seal fishery and other purposes of the voyage. Gibbs C. J. said, 'If the ship had a competent crew to pursue any part of her adventure, it being at her election to pursue what part she chose, she might be deemed seaworthy.'⁽³⁾

(3) *Hucks v. Thornton*, 1 Holt. 30.

Mr. Justice Bayley says, 'The owner is bound in the first instance to provide a ship with a competent crew, but he does not undertake for the conduct of that crew, in the subsequent part of the voyage.'⁽⁴⁾

(4) *Busk v. Roy*, Ex. Ass. Co. 2 B. & A. 73.

In navigating a river, or in approaching or leaving a harbour, where it is customary for vessels of the burthen and description of that insured, to take a pilot, it has been held that the vessel is not seaworthy unless a pilot is taken on board, if one can be obtained. A vessel not having any pilot on board ran upon the anchor of another vessel in navigating the Thames. The underwriters were held not to be liable for the damage occasioned by this accident. Lord Kenyon said that, to be seaworthy, 'the vessel must have a competent pilot.'⁽⁵⁾

A pilot must be on board where it is customary to have one.

(5) *Law v. Hollingsworth*, 7 T. R. 156.

The master of a vessel ready to sail from Boston, called upon a pilot, who refused to take charge of the vessel, on account of its being late in the day, the weather being rough and cold, and large quantities of ice being afloat in the harbour, which would have made it dangerous, and difficult, for him to return into the harbour after quitting the vessel. The vessel sailed without any pilot. Many witnesses were examined as to the usage, and degree of danger; and the jury, in compliance with the instruction given by Chief Justice Parker, were of opinion that the vessel was not seaworthy.⁽⁶⁾

(6) *Stanwood v. Rich*, Mass. S. J. C. Suffolk, Nov. 1817.

The same seaworthiness is not requisite in port and at sea.

If the risk comprehends the time while a vessel is in port, this warranty will be satisfied, though she needs repairs. Insurance was made in England on a vessel then lying at Pillau, where she was delayed more than a month for repairs. The insurers objected to paying a loss, on the ground that the vessel was not seaworthy. Lord Kenyon instructed the jury that the vessel need not be seaworthy for the voyage immediately. The insurers took the risk of this.(1)

(1) *Smith v. Surridge*, 4 Esp. 25.

The ship Eyles was insured at and from Fort St. George to London, and not being in a fit condition to undertake the voyage, she was unloaded at Fort St. George, and went to Bengal for the purpose of obtaining repairs. After being repaired, she returned and took her cargo for the homeward voyage. Lord Hardwicke held that the risk commenced from the time of the vessel's first arrival at Fort St. George, and that she was seaworthy. He said, 'If she went to the nearest place, he should consider it equally the same as if she had been repaired at the very place from which the voyage was to commence.'(2) The objection made by the insurers was upon the ground of a deviation, but the decision implies an opinion of the seaworthiness of the vessel.

(2) *Motteux v. Lond. Ass. Co.* 1 Atk. 545.

Lord Ellenborough says, 'While a vessel remains at a place, a state of repair and equipment may be sufficient, which would constitute unseaworthiness after the commencement of the voyage. But she must be in such a condition as to be in reasonable security. If she be a mere wreck the policy never attaches.'(a)

(3) *Bell v. Reed*, 4 Bin. 127; *Oliverson v. Loughnan*, cited 2 B. & A. 322.

A vessel may be sufficiently staunch, and well enough equipped to navigate a lake or river, when she is not fit to navigate the ocean.(3)

The ship is presumed to be seaworthy until the contrary appears.

A ship is presumed to be seaworthy. If a question arise respecting this warranty it lies upon the insurers to show that it has not been complied with.(b)

But if the vessel spring a leak, or become disabled, or some essential defect is discovered, soon after the risk commences, without any apparent cause from the perils within the policy, or, rather, when it satisfactorily appears that no accident can have happened to occasion the damage or defect, it is inferred that she was defective at the beginning of the risk, and not seaworthy. A vessel sailed from London to Portsmouth, where her timbers were found to be rotten; she was presumed not to have been sound at the time of sailing.(4) And a vessel that sprung a leak, and filled with water the day after sailing, without any

(4) *Lee v. Beach*, Park, 342; Marsh. 160.

(a) *Parmenter v. Cousins*, 2 Camp. 235. See *Hibbert v. Martin*, Park, 344; *Annen v. Woodman*, 3 Taunt. 299; *Cruder v. Phil. Ins. Co.* Condry's Marsh. 840. n.; S. C. Wharton's Dig. 326. n. 79; *Taylor v. Lowell*, 3 Mass. Rep. 348; *Brown v. Girard*, 4 Yeates, 115; *Weir v. Aberdeen*, 2 B. & A. 320; *Oliverson v. Loughnan*, cited 2 B. & A. 322; *Forbes v. Wilson*, Park, 344.

(b) *Parker v. Potts*, 3 Dow, 23; *Taylor v. Lowell*, 3 Mass. Rep. 347; *Barnewall v. Church*, 1 Caines, 234, 246.

apparent cause, and without having encountered any known accident to occasion material damage, was, from this circumstance, considered as not having been seaworthy when she sailed.^(a)

Where it appeared that a 'part of the timbers were decayed, and the iron work in general was very much decayed and wrought loose,' though the ship had encountered a storm after the risk commenced, yet as none of these defects could be traced to the storm, or other accident happening after the risk commenced, but appeared plainly to have existed before, the ship was held not to have been seaworthy at the commencement of the risk.⁽¹⁾

(1) *Douglas v. Scougall*, 4 Dow, 269.

The warranty of seaworthiness relates to the beginning of the risk; as soon as the insurers begin to be liable for losses, the assured becomes bound by the conditions on which the liability of the underwriters depends. When it is said, that if the vessel becomes unseaworthy an hour after the risk commences it is no violation of this warranty, the meaning is that the warranty of seaworthiness is not an engagement that no disaster shall render the vessel unseaworthy.^(b)

The warranty of seaworthiness relates to the beginning of the risk.

If the ship becomes unseaworthy after the commencement of the risk, through the fault or negligence of the assured, or that of his agents, for whose conduct he is answerable, this, like any other unnecessary enhancement of the risk, discharges the underwriters.

The effect of a non-compliance with the warranty of seaworthiness, as well as of the forfeiture of any other condition, is to discharge the underwriters from their liability under the policy. If this condition is forfeited at the commencement of the risk, it doubtless discharges the insurers from all liability whatever; but it does not appear to have been decided that a forfeiture of this condition, subsequently to the commencement of the risk, discharges the underwriters from their liability to pay antecedent losses. It may be inferred, on the contrary, that the underwriters are liable in such case for previous losses.

The effect of a non-compliance with the warranty of seaworthiness.

A vessel insured 'at and from Surinam,' after lying there a month, sailed in an unseaworthy state, not having a sufficient crew. With respect to the return of premium Chief Justice Mansfield said, 'Here is the ship kept a month at Surinam in loading, and to all appearance, in the judgment of mankind, certainly seaworthy, and if she had been sunk or burnt there, the underwriters could have made no defence. And it is very

(a) *Talcot v. Com. Ins. Co.* 2 Johns. 124, & 467. See also *Munro v. Vandam*, Park, 333. n.; *Watson v. Clark*, 1 Dow, 336; *Coit v. Del. Ins. Co.* Wharton's Dig. h. t. No. 76, p. 325.

(b) *Mills v. Roebuck*, Park, 335; *Bermon v. Woodbridge*, Doug. 781; *Watson v. Clark*, 1 Dow, 336; *Hucks v. Thornton*, 1 Holt, 30; *Garrigues v. Coxe*, 1 Bin. 592; *Patrick v. Hallett*, 1 Johns. 245; *Peters v. Phœn. Ins. Co.* 3 Serg. & Rawle, 25; *Plantamour v. Staples*, 1 T. R. 611. n.

strange if the assured can say, on its being proved that the ship was not seaworthy when she finally sailed, that therefore the unseaworthiness shall be carried back to the time of her arrival at Surinam.¹(1)

(1) *Annen v. Woodman*, 3 Taunt. 299.

As a subsequent forfeiture of this condition is held not to relate to the beginning of the risk, in respect to the premium, it may be inferred that it does not so, in respect to the liability of the insurers for losses accruing before the violation of the warranty, since to hold otherwise would be to maintain that a contract may, without the intervention of any illegal act, be null in respect to one of the parties, while it is binding upon the other.

Mr. Justice Sewall, giving the opinion of the court, said, 'If we may have recourse to general reasoning, for want of any direct and complete authority from decided cases, it may be observed, in regard to the implied stipulations on the part of the assured, that the vessel shall be suitably manned, shall be conducted with the advantage of the customary pilotage, and shall be seaworthy; that although the remedy adopted or provided by the common law, against a failure in either of these stipulations, is a forfeiture of the entire contract on the part of the assured; yet this respects losses or damages subsequent, and not previous, to the failure of the assured in his implied engagement.'²(2)

(2) *Taylor v. Lowell*, 3 Mass. Rep. 347.

Though it appears by many of the preceding cases that a non-compliance with the warranty of seaworthiness discharges the insurers from all subsequent liability at least, yet it seems to be intimated, in an opinion given by Chief Justice Abbott, that a non-compliance with this warranty may take place, and still, if the defect, whereby it is violated, is of a temporary nature and soon remedied, and it appears that no loss could have occurred in consequence of the defect, the liability of the underwriters continues, notwithstanding such violation.

A ship being insured from London to Bahia was found, after sailing on the voyage, to be overloaded, and on this account put back for the purpose of discharging a part of her cargo, to which the underwriters consented, by an endorsement on the policy. After being lightened she proceeded on the voyage, during which a loss occurred. Abbott, C. J. 'It is said that this memorandum expressing the consent of the underwriters is void, and that in order to bind the underwriters a new contract was necessary, inasmuch as the fact of the vessel having once sailed with a cargo greater than was proper for that voyage, and therefore in an unseaworthy state, wholly put an end to their liability on the policy. That proposition would go the length of establishing, that if a vessel at the outset of her voyage, be by mistake or accident unseaworthy, owing to some defect which is immediately discovered and remedied before any loss happens in consequence of it, still that the policy would be void and the underwriters not liable. I was surprised at that proposition, because, if true in point of law, I fear we should find many cases where the assured could have no claim upon the underwriters, because something was wanting or something ex-

cessive, at the instant of the ship's departure, although the want had been supplied or the excess removed, before the loss happened. Suppose a vessel is unseaworthy unless she has two anchors, being destined for a long voyage, and she sails from London to Gravesend with only one; shall it be said, that if no loss happens between London and Gravesend, and the vessel at Gravesend takes on board her second anchor, and then proceeds on her voyage, that the underwriters are not liable for a subsequent loss, and that the policy is so completely at an end, that even if the underwriters agree to waive the objection and to allow her to proceed on the voyage, their consent shall be unavailing. These inconveniences, which would be continually occurring in practice, would lead to dangerous consequences, by opening a door to underwriters to break their engagements by means of trivial circumstances, the effect of which no one ever contemplated. I think, therefore, that that proposition can never be maintained.'(1)

(1) *Weir v. Aberdeen*, 2 B. & A. 320.

Section 3. *National Character and Legal Conduct.*

It has been said to be a condition of the policy or an implied warranty, that the ship shall be navigated, and the adventure conducted, according to the laws of the country to which the vessel belongs, the treaties subsisting between that and other countries, and the law of nations.(2) We have seen that the trade must be legal; this warranty has reference to the manner of carrying it on, and the doctrine stated, is, that although the adventure itself be legal, yet if the assured violate the law in prosecuting it, the insurance is thereby defeated. The captain of a vessel employed in the African slave-trade, had not the certificate required by an act of Parliament,(3) that he had served as captain in the same trade in one previous voyage; as chief mate or surgeon for two voyages; or as chief or other mate for three voyages. The insurance on the ship was held to be void on account of the captain's not having the certificate required by the act.(4)

(2) *Marsh.* 177. b. 1. c. 5. s. 4.

The captain has not the certificate required by law.

(3) 31 *Geo.* III. c. 54. s. 7.

(4) *Farmer v. Legg*, 7 T. R. 186. See 1 *Camp. Rep.* 436. n.

But this doctrine appears to be subject to some qualification. The want of a proper certificate in the case just cited was construed by the court to render the voyage illegal, and it is immaterial whether a trade is directly prohibited, or rendered illegal by some act of the assured. Where an act is done of which this is the effect, the policy is vacated on the ground that an illegal trade cannot be insured. But it does not appear that every illegal act of the assured or his agents, in conducting the adventure, renders the voyage illegal; and if an act has not this effect, there seems to be no reason for holding that it defeats the policy on the ground of the violation of any implied warranty, or the forfeiture of any condition. Where any act of the assured or his agents, whether legal or illegal, unnecessarily enhances or changes the risk, the insurer is discharged. But the insurer seems to have no concern with the acts of the assured

How far illegal acts of the assured will affect the contract.

or his agents, except as far as they affect the risks insured against.

But if any acts of the assured or his agents, whether in violation of the law of nations or not, are done out of the usual course of the trade, and are such as the underwriter could not be presumed to anticipate, the loss arising from such acts must fall upon the assured. Acts of this description may have the effect of discharging the insurers from all subsequent liability, on the ground of a deviation, where the risk superinduced is so blended with those insured against, that it is impossible to say that the risk so incurred, might not contribute to any loss which may subsequently accrue.

Chief Justice Marshall says, 'It is not impossible that without a warranty that the vessel is neutral property, the attempt of a neutral vessel to enter a blockaded port might be considered as discharging the underwriters. But no such decision appears ever to have been made; nor is the principle asserted, so far as is known to the court, in any of the treaties on the subject.'⁽¹⁾

(1) *Mar. Ins. Co. v. Woods*, 6 Cranch. 45.

A ship belonging to a Swedish subject resident at Gothenburg, and insured from that place to Riga, took false papers, representing that she came from Bergen in Norway, on account of which she was seized in Russia and condemned. No representation was made of an intention to take false papers, and no leave was given for this purpose in the policy. The sentence of condemnation in Russia proceeded upon the ground of a violation of the law of nations. Lord Ellenborough said, 'I am bound to believe, that the ground alleged in the sentence of condemnation is that upon which the seizure and confiscation proceeded. By this sentence the ship and cargo are condemned for a breach of the law of nations, in carrying fabricated papers. The assured must be considered the efficient cause of the loss by an illegal act, for which no liberty was given in the policy.'⁽²⁾

(2) *Horneyer v. Lushington*, 3 Camp. 85, 15 East, 46.

A neutral ship may carry belligerent goods.

Insurance was made on goods on board of an American, then a neutral, vessel, from New York to Havre; France and England being at war. The vessel was detained by an English privateer and carried into Bristol, where a part of the cargo was condemned as French property. The expenses of this detention were claimed of the underwriters, who resisted payment on the ground that the vessel's having enemy's goods on board was a breach of an implied condition of the policy. But the court held that a neutral vessel might lawfully transport the goods of either belligerent, and that there was no implied condition of the contract of insurance, that the vessel had not such goods on board.⁽³⁾

(3) *Barker v. Blakes*, 9 East, 283.

(2) *Barker v. Blakes*, 9 East, 292; *Richardson v. Maine F. & M. Ins. Co.* 6 Mass. Rep. 102.

The neutral has a right to carry belligerent goods, or goods contraband of war, and at the same time the other belligerent has a right to capture them. It has been intimated in some cases that these rights clash with each other.⁽⁴⁾ This cannot mean that they are inconsistent with each other, for it is impossible that two principles of national law should be so, and if two propositions are so, it follows that one of them at least is

not law. The meaning is that the right of a neutral to transport the goods of either belligerent, is subject to the right of the other belligerent to capture and confiscate the goods, and for this purpose to detain the neutral vessel, if that be necessary to the exercise of the right.

Mr. Justice Sewall says, 'The neutral character of the property is understood by the parties, and necessarily inferred, where the insurance is made by a citizen of a neutral state, resident there, of his own property; and without any express representation or warranty, the assured impliedly engages to preserve his property, and to conduct the voyage insured, in a neutral condition and character, to which alone the insurance applies. But where the insurance is of freight only, of a neutral vessel, it is not a necessary inference, nor is there any implied engagement, that the cargo carried in her shall be neutral; for a neutral vessel may be lawfully employed in carrying a cargo which is the property of a belligerent.' But where the neutral owners of a vessel effected insurance on freight, without disclosing any facts relating to the employment of the vessel, and the cargo on which the freight was to accrue belonged to subjects of the emperor of France, who was then at war, but it was shipped and disguised as the property of the supercargo, who was a neutral, this was held to be a violation of the implied warranty, that the vessel should be conducted in conformity to her neutral character.(1)

Goods of a
belligerent
disguised as
neutral.

Decisions have already been cited, showing that the policy does not imply a warranty that the goods insured, or carried in the ship insured, are not contraband of war.(a)

(1) *Stocker v. Merrimack Ins. Co.* 6 Mass. Rep. 220.

(a) *Juhel v. Rhineland*, 2 Johns. Cas. 121; *Rhineland v. Juhel*, 2 Johns. Cas. 487; *Seton v. Low*, 1 Johns. Cas. 1; *Skidmore v. Desdoity*, 2 Johns. Cas. 77; *Richardson v. Maine F. & M. Ins. Co.* 6 Mass. Rep. 102. The circumstance of the goods being contraband is undoubtedly very material to the risk. It would therefore appear to be remarkable to find the principle established by different courts, that the fact of the goods being contraband should not affect the policy, though that fact were not represented, or stated in the policy, were it not recollected that during the wars between England and France from 1790 to 1815, the courts of those countries, and more especially the vice-admiralty courts, established in the colonies, considered very many articles as belonging to the class of contraband. Most of the courts of the United States adopted the principle of the English courts, that foreign judgments are conclusive as to the facts adjudged. Unless, therefore, they had permitted the assured to insure, without any representation or specification in the policy, articles which the foreign courts condemned as contraband, insurance would have afforded but a very imperfect indemnity against the peril of capture. But both of these principles, as well that which makes a foreign judgment conclusive, otherwise than as between the parties to it, as that which permits the insurance of contraband goods without any specification of them in the policy, or any representation of their contraband character, seem to admit of very serious doubt.

Implied warranty of the national character of the ship.

(1) *Price v. Bell*, 1 East, 663.

(2) *Christie v. Secretan*, 8 T. R. 192.

(3) *Dawson v. Atty*, 7 East, 367.

(4) *Bell v. Carstairs*, 14 East, 393.

(5) *Bell v. Carstairs*, 14 East, 374.

The question has occurred, whether the policy implies a warranty that the vessel shall be documented and navigated according to laws, usages, and treaties of the country to which she belongs. (1) In a case of insurance of goods on board of the *Peggy*, of *Georgetown*, Lord Kenyon and Mr. Justice Grose intimated that there is some implied warranty as to the national character of the vessel, but Mr. Justice Lawrence dissented from this opinion. In this case, however, by the description of the ship as belonging to an American port, the policy seemed to intimate its national character. (2)

Goods insured from Liverpool to Messina were on board of an American ship, which was captured by the Spaniards, and condemned in Spain, on the ground that she 'had no certificate of having on board no contraband of war, as required by the treaty between the United States and Spain.' Lord Ellenborough said, 'As the ship was not represented to be American and there being no undertaking in the policy itself that she was American, there was no necessity for her being documented as such.' (3) The same judge afterwards speaking of this opinion said, 'it was true with reference to a policy on goods; in such case the assured was not liable to suffer on account of any defect in the documents belonging to the ship, with the procurement or existence of which he had no concern.' (4)

A ship, freight, and part of the cargo, belonging to Americans, being insured in England, 'from Virginia to Holland or Germany, with leave to touch at or off Falmouth, and to take papers and clearances for any ports or places,' were captured by a French privateer off Plymouth and carried into Brehat. Both ship and cargo were condemned by the council of prizes at Paris, on the ground of the want of the documents required by the treaty between France and the United States. There was no representation or express warranty that the ship or cargo was American. Lord Ellenborough said, 'In a policy on the *ship*, whether there is a warranty or representation respecting the nation to which she belongs or not, as the assured is bound to have on board such documents as are required by treaties with particular nations, to evince his neutrality in respect to such nations; the want of them in the event of capture, and when the production of them becomes necessary, is most material. On the ground that the ship, goods, and freight, all of them belonging to nearly the same American proprietors, were condemned on account of the common default of all the proprietors in their joint character of ship-owners, in not having a regular passport on board as required by the treaty of their own state with France, we are of opinion that the assured cannot claim from the underwriters an indemnity for a loss thus occasioned by themselves.' (5)

Where no express warranty or representation was made of the national character of the ship insured, Sir James Mansfield said, 'I think that the ship must be properly documented or she will never be safe. We fully agree with the case of *Bell v.*

Carstairs, where the objection was the want of such a license as was required by the treaty with Spain.'(1)

The *Pennsylvania*, an American and neutral ship, being insured from London to Riga, was seized on the voyage and carried into a Danish port and there condemned. One reason, among others, assigned for the condemnation, was the insufficiency of her documents. Sir James Mansfield said, 'It is stated on the face of the sentence, that the want of the sea-passport was a ground of condemnation. The ship is in the common case of an American ship, which, therefore, ought to be documented as a neutral ship. It is quite ridiculous to talk of this ship being an American, if she is not to be documented as an American ship.'(2)

(1) *Le Che-minant v. Pearson, and same v. All-nutt*, 4 Taunt. 367.

A case had previously occurred in New York involving this question. The policy was upon the cargo, but the opinion of the court is equally applicable to a policy upon the ship.

(2) *Steel v. Lacy*, 3 Taunt. 285.

Goods insured in 1797, from Curraçoa to New York, were captured and condemned by the French, a ground of condemnation being that the vessel had not all the documents requisite to show her national character. There had been no express warranty or representation of the national character of the ship or goods. Chief Justice Kent, giving the opinion of the court, said, 'I very much doubt whether it be a part of the implied warranty of seaworthiness that the vessel shall have her proper documents on board. There is no case that goes to that length. These documents are only material where the national character of the vessel is warranted or represented. The sea-letter, and other documents, could only have been requisite to protect the vessel as a neutral, but it was no part of the contract that she was to sail in that character. A vessel may be competent to perform the voyage insured without the possession of these documents; and although we do not profess to declare a very strong opinion on this point, we are inclined to think that the want of those documents could not have furnished to the underwriters a valid defence against the policy.'(3)

(3) *Elting v. Scott*, 2 Johns. 157.

Although there is some apparent inconsistency among the preceding opinions, they seem, on the whole, pretty satisfactorily to establish the principle, that the insurers of the ship are not liable for any loss occasioned by the want of documents, required by the laws and treaties of the country of which it bears the national character, or by the want of the documents and means of protection, which usually accompany ships of the same national character.

Result of the preceding cases.

In regard to the distinction made by Lord Ellenborough, between a policy on the ship and one on the cargo; there seems to be precisely the same reason for making the assured on goods, answerable for this neglect of the owners of the vessel to furnish her with documents, that there is for holding him to be answerable for the seaworthiness of the vessel, though there is no fault or neglect on his part. But whether it would be expedient to hold him so strictly answerable for the seaworthiness of the

Effect of a non-compliance with the implied warranty of national character and legal conduct.

The master leaves his passport.

(1) *Cleveland v. Un. Ins. Co.* 8 Mass. Rep. 322.

(2) *Bell v. Carstairs*, 14 East, 393, 394.

ship, might perhaps admit of some doubt, had not the principle been so long established and so uniformly maintained.

In regard to the effect of a non-compliance with this implied agreement or condition respecting the documents of the ship, and the conduct of the assured in navigating it, courts have not considered it as incurring a forfeiture of the contract. As far as the assured induces any unusual and unnecessary risk, it is held that he must bear the consequent loss, but his contract is not necessarily made void. If the risks insured against are not enhanced or changed, the insurers still remain liable for them.

The captain of a vessel insured, had, through accident, left his passport at the Isle of France. The ship was captured and carried into Columbo in 1805, where she was condemned as being employed in an unlawful trade, but the decree of condemnation was reversed on appeal. There was no warranty or representation of the national character of the vessel. Mr. Justice Sedgwick, giving the opinion of the court, said, 'It was owing solely to the negligence of the master that the papers were left at the Isle of France; *if that was the cause of the loss, the underwriters are not responsible.* The principle of an implied warranty on the part of the assured, that every thing shall be done to prevent a loss, pervades the whole subject of marine insurance.'⁽¹⁾ But it is implicitly admitted in this case, that if the loss was occasioned by any cause other than the want of the passport, and if it appeared that the want of the passport could not have contributed to the loss, the insurers remained liable. It is not intimated that the absence of this document necessarily put an end to the contract.

Speaking of the documents required by treaties to show the national character of the ship, Lord Ellenborough, giving the opinion of the court, said, 'In respect to a ship which is not the object either of representation or warranty, the existence of such papers at the commencement of the voyage, or the want of them at any other time or for any other purpose, except in the event of capture, and when the production of them becomes necessary, is immaterial.'⁽²⁾

CHAPTER IX.

EXPRESS WARRANTIES AND CONDITIONS.

Section 1. What constitutes an Express Warranty.

AN express warranty is an agreement expressed in the policy, whereby the assured stipulates that certain facts relating to the risk are, or shall be, true, or certain acts relating to the same

subject have been, or shall be, done. It is not requisite that the circumstance or act warranted should be *material* to the risk; in this respect an express warranty is distinguished from a representation. Lord Eldon says, 'It is a first principle in the law of insurance, that if there is a warranty, it is a part of the contract that the matter is such as it is represented to be. The materiality or immateriality signifies nothing. The only question is as to the mere fact.'⁽¹⁾

An express warranty or condition is always a part of the policy, but, like any other part of the express contract, may be written in the margin,⁽²⁾ or contained in proposals or documents expressly referred to in the policy, and so made a part of it.⁽³⁾

An insurance of goods was described in the policy to be made 'for account of John Mackay, of Boston.' Mr. Justice Radcliff said, 'The insurance being for account of John Mackay, of Boston, I consider equivalent to a representation that he was owner, and that the insurance was for his benefit. He being an American, and residing at Boston, and so known to the parties at the time of effecting the policy, the insurance is clearly to be considered as made on American or neutral property.' The court put the same construction upon the policy as if the cargo had been warranted neutral.⁽⁴⁾

A warranty is often made by saying expressly in the policy that the assured *warrants* such a fact. But a formal expression of this sort is not requisite to constitute a warranty. Any direct, or even incidental allegation of a fact relating to the risk, has been held to constitute a warranty. If insurance be made on 'the Swedish brig *Sophia*,' 'the American ship *Minerva*,' 'the Spanish brig *New Constitution*,' &c. or on goods on board of vessels so described, it is a warranty that the vessel is Swedish, American, or Spanish, according to such description, and is equivalent to a formal provision that the assured warrants the vessel to be of a particular national character.^(a)

But describing the vessel in the policy by an English name, is not a warranty of its having an English national character.⁽⁵⁾

Doubts were entertained by the judges in Pennsylvania, whether insurance 'on the good British brig called the *John*,' was necessarily a warranty of the national character of the vessel. Whether these words would amount to a warranty, and what construction was to be put upon them, Judges Yeates and Brackenridge thought would depend, not only upon the words themselves, and manner and connexion in which they were introduced into the policy, but also upon the whole policy. Mr. Justice Yeates was of opinion, that this description was not a warranty of national character, *because the risks insured against could not be affected* by the fact that the vessel was British, since she was in-

(1) *Newcastle F. Ins. Co. v. Macmorran*, 3 Dow. 262.

(2) *Dennis v. Ludlow*, 2 Caines, 111; *Bean v. Stupart*, Doug. 11; *Kenyon v. Berthon*, Doug. 12. n.
(3) *Routledge v. Burrell*, 1 H. B. 254; *Worsley v. Wood*, 6 T. R. 710.

Insurance for account of J. M. of B. is a warranty.

(4) *Kemble v. Rhineland*, 3 Johns. Cas. 130.

It is not necessary to use the word *warrant*, or any formal expression.

(5) *Clapham v. Cologan*, 3 Camp. 382.

(a) *Lewis v. Thatcher*, 15 Mass. Rep. 431; *Higgins v. Livermore*, 14 Mass. Rep. 106; *Atherton v. Brown*, 12 Mass. Rep. 152; *Lothian v. Henderson*, 3 B. & P. 499; *Barker v. Phœn. Ins. Co.* 8 Johns. 237; *Goix v. Low*, 1 Johns. Cas. 341; *Murray v. Unit. Ins. Co.* 2 Johns. Cas. 168; *Vandenheuvel v. Un. Ins. Co.* 2 Johns. Cas. 127.

(1) *Mackie v. Pleasants*, 2 Bin. 363.

A warranty relates to the risk.

sured against *sea-risks only*; and the risk was to end on capture.(1) This distinction seems to be just; for though the materiality of the fact stated in the policy is not requisite to constitute a warranty, yet there seems to be no reason for considering the allegation of a fact to be a warranty, if it evidently cannot have any relation to the risk. But a fact expressed in the policy, will no doubt be presumed to have relation to the risk, unless it appears unquestionably that it can have no such relation. Thus if it could be supposed in the preceding case, that the insurer might prefer to insure a British vessel against sea-risks, rather than one of any other national character, the description might be considered a warranty, a compliance with which would be a condition on which the liability of the underwriter would depend, though all other underwriters should be of opinion that the sea-risk would be less upon an American or French vessel. But if the national character of the vessel could not possibly, in the opinion of any man, have any relation to the sea-risk, there seems to be no reason for considering it a warranty. This distinction can apply however only to facts incidentally expressed, for if the parties use the formal expression of a warranty, no question of this sort can arise.

(2) *Kenyon v. Berthon*, Doug. 12. n.

'Warranted the property of the assured, all Americans.'

(3) *Jenks v. Hallett*, 1 Caines, 60.

(4) *Delongue-mere v. N. Y. Firem. Ins. Co.* 10 Johns. 120.

On the cargo being wine.

(5) *Muller v. Thompson*, 2 Camp. 610.

Warranted free from average &c. is not a warranty.

But since most facts alleged in a policy may be supposed to have some relation to the risk, in the minds of the parties, they are generally construed to be warranties. Where it was stated in the policy that the vessel was in port on a certain day, it was held to be a warranty of that fact.(2)

A policy was made on goods 'warranted the property of the assured, all Americans.' This was held to be a warranty that the property was neutral, as the United States were neutral at the time when the policy was effected.(3)

The insurance of goods to a certain port, as to 'port Sisal,' is not a warranty that the place has any port or harbour belonging to it. The meaning of the expression is to be determined by the fact, with which the underwriter is supposed to be acquainted.(4)

Where the policy was expressed to be 'on the cargo, being 1031 hogsheads of wine,' the cargo consisted of the wine insured, and also eight cases of British manufactured goods. In behalf of the underwriters it was contended that this should be considered a warranty that the whole cargo consisted of the wine insured. Lord Ellenborough said, 'I think *the cargo* does not mean the *whole cargo*, but merely that the insurance shall attach upon that part of the cargo which consists of the 1031 hogsheads of wine. The risk was not increased by other goods being put on board.'(5)

As any statement of a fact in the policy is a warranty, though neither the word *warrant*, nor any formal expression of like import is used; so there is frequently a warranty in form, where there is none in fact. The assured often *warrants* the property *free from average*, *free from detention or capture*, or from other losses and perils, which is no more than an agreement that those shall not be among the perils and losses insured against, and for

which the underwriter is to be liable. Although these forms of expression are sometimes spoken of as warranties, it would be absurd to consider them such in their character and construction, since, in the case of an insurance *free from average*, for instance, it would be adopting the doctrine that the occurrence of an average loss would render the policy void, and consequently that the happening of a loss, which is not insured against, deprives the assured of the right to recover for one that is insured against.

Section 2. *Compliance with an Express Warranty.*

It is another distinction of an express warranty or condition from a representation, that a warranty must be *strictly* and, it is even said, *literally*, complied with; whereas it is sufficient that a representation is complied with equitably and substantially. It is held that the intention of the parties in a warranty, except as to the meaning of the words used, is not to be inquired into; the assured has chosen to rest his claims against the insurers on a condition inserted in the contract, and whether the fact or engagement, which is the subject of the warranty, be material to the risk or not, still he must bring himself strictly within that condition. The rigid construction put upon warranties, in this particular, has perhaps arisen, in part, from the maxim of the common law, that conditions are to be severely construed in regard to the party imposing them on himself. 'A warranty,' says Lord Mansfield, 'must be strictly performed, nothing tantamount will do.' (1) Mr. Justice Buller says, 'It is a matter of indifference whether the thing warranted be material or not, but it must be literally complied with;' (2) and Mr. Justice Ashurst says, 'The very meaning of a warranty is, to preclude all questions whether it has been *substantially* complied with; it must be *literally*.' (3)

A non-compliance with a warranty, though it occasions no damage and does not change or increase the risk, has the effect of discharging the insurers from their liability. (4)

It has been held that a temporary non-compliance with a warranty by a defect, which is remedied before any loss happens, still discharges the underwriters. It was warranted, that the vessel sailed with an armament and 'fifty hands or upwards;' she had sailed, with only forty-six hands, from Liverpool to Anglesea, where she took on board others to make up the number warranted, and when afterwards captured, while prosecuting her voyage, she had on board fifty-two hands. The jury found that the vessel was as safe from Liverpool to Anglesea with forty-six, as she would have been with fifty-two hands. But Lord Mansfield said, 'A representation may be equitably and substantially answered, but a warranty must be strictly complied with. It is a condition, and unless performed, there is no contract. The contract does not exist, unless it be literally complied with.' (5)

A warranty must be strictly complied with.

(1) *Pawson v. Watson*, Cowp. 785.

(2) *Blackhurst v. Cockell*, 3 T. R. 360.

(3) *De Hahn v. Hartley*, 1 T. R. 343; 2 T. R. 186.

Non-compliance avoids the policy though no damage ensues from that cause.

(4) *Rich v. Parker*, 2 Esp. 615; 7 T. R. 705; *Woolner v. Muilman*, 3 Burr. 1419; *Fernandes v. Da Costa*, Park, 287; *Law v. Hollingsworth*, 7 T. R. 156.

(5) *De Hahn v. Hartley*, 1 T. R. 343; 2 T. R. 186.

In a policy upon a cotton mill, it was 'warranted that the mill was conformable to the first class of cotton and woollen rates.' According to the proposals of the company, buildings of the first rate of risks, were those having 'stoves or coakles, standing at a distance of not more than one foot from the wall;' those having stove-pipes or flues of more than two feet in length were considered to belong to the second class of risks. At the time of making the policy the building was not of the first class, but had been altered so as to conform to that class, before the loss took place. Lord Eldon said, 'If the mill was warranted as being of the first class, it must be such as it was warranted to be, otherwise there is no contract.'⁽¹⁾

(1) *Newcastle Fire Ins. Co. v. Macmorran*, 3 Dow, 255.

The same compliance may satisfy a warranty or representation.

(2) *Vandenheuvel v. Church*, 2 Johns. Cas. 173. n.

The meaning of the words used in a warranty are determined as in other cases.

(3) *Bean v. Stupart*, Doug. 11.

The rule as to a strict compliance may operate against the insurers.

(4) *Kemble v. Rhineland*, 3 Johns. Cas. 134.

(5) *Hyde v. Bruce*, Marsh. 347.

Whether a warranty made incidentally is subject to the same construction as one made formally.

Where an equitable and substantial fulfilment is the same as a strict and literal one, a representation and warranty are equivalent to each other; as was held in New York to be the case of a representation or warranty of the neutral character of property.⁽²⁾

Though a strict compliance with a warranty is required, yet the construction of the words is determined, as in other cases, by usage and common acceptance. Where the warranty was that the vessel had '30 seamen' on board, and to make up the number it was necessary to include the steward, cook, surgeon, some boys and apprentices; Lord Mansfield said, 'the question was whether, in this warranty, the word *seamen* was used in the strict literal sense or not. If it was, the warranty has not been complied with. It is a matter of construction. Boys are reckoned seamen, not only at the custom house, and Greenwich Hospital, but in the distribution of prizes. There is scarcely now such a thing as a ship entirely manned with seamen strictly so called.' And it was held that the warranty had been complied with.⁽³⁾

Mr. Justice Kent said, 'A warranty must be literally complied with, but this strict compliance ought to operate in favour of, as well as against, the assured, whenever he can bring himself within the terms of it.'⁽⁴⁾ An instance of this occurred in the case of a warranty that 'the ship should have twenty guns.' She had in fact twenty-two guns, but only twenty-five men, a number quite short of the necessary complement for twenty guns. Lord Mansfield held this to be a compliance with the warranty. He said, 'If a warranty be intended to mislead, it is a fraud. In this case there is no ground to impute fraud, and therefore the assured is entitled to recover.'⁽⁵⁾

In a case decided in New York a distinction was taken by Mr. Justice Lewis between a formal warranty of a fact, and the incidental statement of it in connexion with the description of the subject. The policy was on 'the American ship *Minerva*;' he said the words were not in the form used for a warranty but were only description, and *therefore to be taken liberally*. But the other judges thought the 'construction, that every description, importing a designation of the condition of the thing insured, as distinguished from, and added to, its mere identification, should be deemed a warranty, would perhaps be more conform-

able to the scope of the authorities on this subject.' And they were of opinion that a warranty, whether expressed in one form or another, should be subject to the same rules of construction.(1)

This strictness in construing the statements incidentally made in the policy, does not prevail to the same extent universally in other countries. Emerigon says, if insurance be made on a vessel described in the policy to be a *ship*, which is in fact a brig or sloop, the policy is void, provided the insurers did not know what sort of vessel it was, since they might have been led by the description to form too favourable an estimate of the risk, but if they were acquainted with the vessel, they will be bound by the contract. He says, if the vessel be superiour or equivalent to what it is described to be, the conditions of the contract will be satisfied.(2)

A compliance with a warranty or any other agreement is dispensed with, if it be rendered unlawful by a law enacted after the time of making the policy.(3) But if a compliance be unlawful at the time of making the policy, the contract will be void; for, as we have seen, whenever an essential part of the contract, such as an express warranty is considered to be, is unlawful, it has the effect of defeating the contract.

It has, in one case, been specifically decided that a non-compliance with a warranty will not discharge the insurers, where it is occasioned by the direct operation of some one of the perils insured against.(4) Suppose a ship, insured against arrests and detention, and warranted to sail on or before a certain day, to be prevented from sailing by an arrest and detention.(5) The embargo or other cause of detention, may be removed before the assured has intelligence of it, which will take away his right of abandoning and claiming for a total loss. His insurance will therefore be defeated, unless a literal fulfilment of the warranty is dispensed with, in case of the non-compliance being occasioned by some of the perils insured against. It will subsequently appear that a deviation from the ordinary course of the voyage is justified, where it is occasioned by the operation of some of the perils assumed by the underwriters, which seems to be an analogous case.

A warranty has been defined to be a condition precedent, but the definition seems to be applicable only to a warranty relating to the commencement of the risk. If it relates to a circumstance necessarily subsequent to the commencement of the risk, as that the ship shall take on board an armament at an intermediate port in the course of the voyage, it can hardly be considered a liberal construction of the contract, to hold that the assured is not entitled to recover for an antecedent loss, though the warranty should not be complied with, in a case free from all imputation of fraud. The premium is unquestionably due in this case,(6) which affords some ground of inference that a previous loss might be recovered, since it supposes a valid contract to have subsisted, at some time, between the parties. There is no question that the insurers are liable for a total loss accruing

(1) *Goix v. Low*, 1 Johns. Cas. 341.

(2) 1 Emer. c. 6. s. 3. See also Poth. n. 106.

A law making compliance unlawful excuses a non-compliance.

(3) *Brewster v. Kitchell*, Lord Raym. 371. S. C.; 1 Salk. 198; See also 1 Emer. 543. c. 12. s. 31.

Case of a compliance being prevented by a peril insured against.

(4) *Havelock v. Hancill*, 3 T. R. 277.

(5) See *Cruikshank v. Jansson*, 2 Taunt. 301.

Whether a non-compliance with a warranty has a retrospective operation.

(6) *Hendricks v. Com. Ins. Co.* 8 Johns. 1.

(1) *Cruikshank v. Janson*, 2 Taunt. 301.

previously to the time to which the warranty relates,(1) and there seems to be the same reason for holding them liable to pay a partial loss under the same circumstances.

The same observations apply to a warranty relating to the whole period of the risk, as, that the property is neutral, or that the ship shall have a certain number of men and guns. If the warranty is complied with for a time, during which a loss happens, and subsequently a violation of the warranty takes place, there being however no fraud on the part of the assured; it seems to be equitable at least, that he should be entitled to recover for this loss.

(2) 3 Mass. Rep. 337. 340.

Chief Justice Parsons intimates that the right of recovering such previous loss, might perhaps depend in some measure upon the circumstance of the policy being made before or after the loss actually takes place;(2) but it does not appear upon what principle such a distinction can be made. Mr. Justice Sewall, in giving the decision of the court, laid down the principle that a loss, happening before a forfeiture of the implied warranty of seaworthiness, might be recovered notwithstanding such forfeiture, but he did not distinctly express an opinion in regard to the right of recovering, subsequently to a forfeiture of an express warranty, for an antecedent loss.(3)

(3) *Taylor v. Lowell*, 3 Mass Rep. 347.

Section 3. Time of Sailing.

Under a warranty that the vessel sailed or will sail on or before a certain day, a question arises in regard to what constitutes a *sailing* on the voyage. A vessel has *sailed* the moment she is unmoored and got under weigh, in complete preparation for the voyage, with the purpose of proceeding to sea, without further delay at the port of departure. Lord Mansfield said, 'To constitute a sailing under this warranty, the vessel at the time of sailing must be, in the contemplation of the captain, at absolute and entire liberty to proceed to her port of delivery in a mathematical line, if it were possible.'(4)

(1) *Thelluson v. Staples*, Doug. 368. n.

A ship insured 'at and from Jamaica to London free from capture and restraints, and detainments of kings, princes, and people,' and 'warranted to sail on or before the 26th of July 1776,' was ready to sail and would have sailed on the 25th of that month, had she not been detained by an embargo laid by the order of the governor of Jamaica, which was not raised until after the time when the ship was warranted to sail. The warranty was held to be violated.(5) A compliance with the warranty was prevented by a peril not insured against.

(5) *Hore v. Whitmore*, Cowp. 784.

The ship sails within the time and waits for convoy at a subsequent port until after the time warranted.

A vessel, warranted to sail on the same voyage on or before the first of August, with a stipulation for a return of premium for convoy, proceeded on the 26th of July, from St. Anne's, in Jamaica, for Bluefields, in the same island, for the purpose of joining convoy at Bluefields. The convoy was ready to sail, but was detained by an embargo until after the first of August. Bluefields was not on the course from St. Anne's to London.

Lord Mansfield said, 'We are satisfied that the voyage from Jamaica to England began at St. Anne's; the vessel sailed from St. Anne's to England by the way of Bluefields. If she had gone to Bluefields, for any purpose independent of the voyage to England, to take in water or letters, or to wait in hopes of convoy coming there, none being ready, that would have given it the condition of one voyage from St. Anne's to Bluefields, and another from Bluefields to England. Here she had no other object than to come to England directly by the safest course.'⁽¹⁾

A ship insured for the same voyage was 'warranted to sail from Jamaica on or before the first of August.' The ship having taken in her whole lading and papers, sailed, on the first of August, from Savannah La Mar, in Jamaica, to Bluefields, the rendezvous for convoy. On the 25th of July an embargo had been laid by the governor of Jamaica on all ships in the island, which was not taken off until the 9th of August. As soon as the ship had crossed the bar in going out of the harbour of Savannah La Mar, on the first of August, the captain returned to the shore in a boat, and made a protest against losses and damages sustained, or to be sustained, on account of the embargo, which he could not have made at Bluefields. He proceeded the same day to Bluefields, whence the ship did not sail until the 9th of August, when the embargo was taken off. The captain knew of the embargo before he sailed from Savannah La Mar, but supposed it to be intended merely to prevent vessels from sailing without convoy, and that it would be taken off on his arriving at Bluefields, where he expected to find the convoy. The convoy did not arrive, however, until the 9th of August. Lord Mansfield said, 'Whether this was a *bona fide* sailing on the first of August, or not, depends on the credit of the captain. He positively swore that he expected to find convoy ready at Bluefields that day, in which case the embargo would have ceased immediately.' Buller, J. said, 'If the captain had expected and meant to wait for convoy, it would not have been a sailing on the voyage.' Lord Mansfield and Justices Ashhurst and Buller were in favour of supporting the verdict of the jury for the assured. Willes J. dissented from their opinion. He said, 'It appears to me that the captain did not mean a sailing on the voyage. If he had intended to proceed directly, he had no occasion to quit his ship in order to make the protest.'⁽²⁾ This case turns wholly upon the captain's supposing himself to be at liberty to proceed on the voyage when he got under weigh on the first of August, at Savannah La Mar. But he knew of the embargo. The case therefore rests upon the principle, that if the captain sails, knowing of an impediment to his proceeding, which he expects will be seasonably removed, but is mistaken in this expectation and hindered by the impediment from proceeding on the voyage within the time warranted, still this is a sailing within the time, and a compliance with the warranty. This case certainly comes very near to being inconsistent with the preceding. It does not appear

(1) Bond v. Nutt, Cowp. 601; Doug. 366. n.

(2) Earle v. Harris, Doug. 357.

The ship sails with the intention of stopping at another port in the island from which she is warranted to sail.

(1) *Thellusson v. Ferguson*, Doug. 361; *Thellusson v. Staples*, Doug. 366. n.

Warranty to sail after a certain time.

(2) *Cruikshank v. Janson*, 2 Taunt. 301. See also *Vezian v. Grant*, Park, 485.

Warranty to sail from an inland port.

The port of London.

(3) *Park*, 497.

whether the court considered the peril of the embargo to be covered by the policy.

A French ship, insured at and from Guadaloupe to Havre, was 'warranted to sail on or before the 31st of December.' She sailed from Point à Pitre, in Guadaloupe, on the 24th of October, with an order, however, upon the *role d'équipage*, or muster-roll, that the captain should stop at Basseterre, the residence of the governor in the same island, to receive despatches for the government. Basseterre was in the course of the voyage, and the ship would have passed under the guns of the fort at that place, if the captain had received no orders in regard to touching there. He sailed from Point à Pitre with the intention of stopping at Basseterre, where he understood that he was ordered to touch for the purpose of joining convoy and taking public despatches, but he did not expect to be detained there. He was, however, detained at Basseterre until the 10th of January, when he proceeded on the voyage with convoy, which arrived at Basseterre after the 31st of December. The ship was captured in the course of the voyage by an English vessel. It was taken for granted that unless the departure from Point à Pitre, under these circumstances, was a sailing within the terms of the policy, the warranty had not been complied with. Lord Mansfield said, 'The ship could not sail from any part of the island without the governor's leave. But the captain, when he left Point à Pitre, expected to meet with convoy at Basseterre, and proceed immediately without interruption.' Buller J. said, 'There must be a *bona fide* sailing, which I think there was in this case.' It was accordingly held that the warranty had been complied with; and Mr. Justice Willes, who dissented from the opinion of the other judges in the preceding case, concurred with them in this.(1)

A ship was insured 'at and from Jamaica, warranted to sail after the 12th day of January.' Before that day, the vessel, being completely loaded, sailed from Port Maria, a hazardous station for ships in that island, for Port Antonio, in the same island, the accustomed rendezvous for convoy, for which it was proposed there to wait. She was lost in this passage, and it was objected, in behalf of the insurers, that this was a sailing before the 12th of January; but the court held that the warranty had not been violated. They considered the departure from Port Maria not to be a *sailing* within the meaning of the warranty.(2)

Questions have arisen under the warranty in regard to what is a *sailing* from an inland port. It has been maintained, though not to my knowledge judicially decided, that the port of London extends to Gravesend, and that a vessel has not *sailed* from the port of London, until the time of her departure from Gravesend, since vessels obtain their final clearances at Gravesend, and goods are not entitled to debenture until after the *cocket*, which is the last paper of clearance, is obtained at that place.(3) This opinion has been confirmed by a decision on a license permitting the exportation of goods from the port of London be-

fore the 10th of September. The vessel cleared out at London on the 9th, and at Gravesend on the 12th of that month. The court held that this was not an exportation within the terms of the license.⁽¹⁾

(1) Williams v. Marshall, 2 Marsh. Rep. 92; Moore, 162.

A vessel was insured from Savannah, and warranted to have 'sailed early in October.' She had cleared out at the custom house on the 15th of September, and dropped down the river about three miles to Five Fathom Hole, and afterwards about eleven miles to Cockspur, at both which places vessels of heavy burthen finish their loading. She remained for some time at Cockspur, waiting for the recovery of the captain who was sick on shore, and she finally sailed from that place on the first of October. Chief Justice Kent said, 'The inception of the voyage by sailing must depend on the *quo animo* or *bona fide* intent. It is very clear the voyage did not commence till the vessel left Cockspur. She left the port of Savannah for a temporary purpose, distinct from the object of the voyage. I have no doubt the sailing in the policy meant the going to sea from Cockspur.'⁽²⁾

Warranty to sail from Savannah.

(2) Dennis v. Ludlow, 2 Caines, 111.

A policy was made on goods and freight, at and from Pont-neuf on the river St. Lawrence, to London, with a warranty 'to sail on or before the 28th of October.' Pont-neuf is about thirty miles above Quebec. It has no custom house, and vessels going to sea from thence, clear out at Quebec. On the 26th of October the vessel under the command of the mate, with a sufficient crew for the river navigation, but not for the voyage, dropped down from Pont-neuf, and reached Quebec on the evening of the 28th. The captain had gone down to Quebec before, to get his papers at the custom house. The crew was completed at Quebec, and on the 29th the captain obtained his clearance. He sailed on the 30th, not having been able to obtain a pilot on the preceding day. Lord Ellenborough said, 'The policy contemplated a sailing upon the voyage; the ship's dropping down from Pont-neuf to Quebec, without her complement of men, showed that that was only preparatory to the voyage. "Warranty to sail on such a day," must mean to sail on the voyage, that is, when the ship could get her clearances, and sail equipped for the voyage.'⁽³⁾ And accordingly this was held not to be a sailing, on or before the 28th of October, within the meaning of the warranty.

Warranty to sail from Pont-neuf.

(3) Risdale v. Newnham, 3 M. & S. 450.

If a vessel is insured from different ports, the warranty of the time of sailing will have reference to the last port of lading. Freight was insured 'from Surinam and all or any of the W. I. Islands to London,' and the ship was 'warranted to sail on or before the first of August.' She sailed on that day from Surinam with a full cargo, and on the fourth put into Tortola for convoy. The court considered that the sailing on the first of August from the last port of lading satisfied the warranty, and that the introduction of '*all or any of the W. I. Islands*,' was for the benefit of the assured.⁽⁴⁾

Insurance from different ports with warranty of time of sailing.

But if a ship is warranted to sail from one port, with liberty to touch at another, the sailing from that other within the time warranted, has been held not to satisfy the warranty. The

(4) Wright v. Shiffner, 11 East, 515; 2 Camp. 247.

(1) *Vezian v. Grant, Park*, 485.

Departure is different from sailing.

ship was insured 'at and from Martinico, with liberty to touch at Guadaloupe, warranted to sail after the 12th of January.' She sailed from Martinico to Guadaloupe before the 12th of January, and proceeded from Guadaloupe on the voyage insured, after the 12th of January, without putting into Martinico, as was intended, if a full cargo had not been obtained at Guadaloupe. Mr. Justice Buller thought this was not a compliance with the warranty.(1)

A distinction has been made between a warranty *to sail*, and a warranty *to depart*. Insurance was made on the ship *Neptunus*, at and from Memel to England, 'warranted to depart on or before the 15th of September.' The vessel, with her clearances and cargo on board, and being completely ready for the voyage, hove up her anchor and got under weigh on the 9th of September, with the intention of proceeding to England, there being at the time some prospect of favourable weather. Before she had been half an hour under weigh the weather changed, and she was obliged to come to anchor at the Haff or river-mouth, within the distance of a half of a mile from the sea, where she lay, with above thirty other ships, until the first opportunity for sailing, which was on the 21st of September. Chief Justice Gibbs said, 'If this warranty had been that the vessel should *sail* on or before the 15th of September, I should have thought most clearly that she had sailed. The warranty *to sail* means that she shall commence her voyage, and in the present case the ship was under weigh and in the prosecution of her voyage, before the time prescribed. The decisions hitherto have been, that when a vessel got under weigh the warranty was complied with. But I think the word *depart* will not bear that construction, but must mean a departure from the port of Memel.' Dallas, J. 'I am of opinion that there is a distinction between *sailing* and *departing*.'(2)

(2) *Moir v. Roy. Ex. Ass* Co. 1 Marsh. Rep. 576. S. C. 6 Taunt. 241; 3 M. & S. 461; 4 Camp. 84.

Section 4. Convoy.

(3) 13 Car. II. stat. 1. c. 9.
(4) 22 Geo. II. c. 33. s. 2.
(5) 38 Geo. III. c. 76.
(6) 43 Geo. III. c. 57.
See *Long v. Duff*, and *Long v. Bolton*, 2 B. & P. 209.

Another express warranty that frequently appears in English policies is that of convoy. Several laws have been enacted in Great Britain on this subject. In 1661 a law was passed prescribing to the officers of the public armed ships, their duty in convoying merchantmen in time of war.(3) A similar act was again passed in 1749.(4) And by an act of 1798,(5) continued in 1803,(6) all vessels having a British register, with some exceptions enumerated in the statute, are forbidden to sail without convoy, in time of war, under the penalty, among others, of forfeiting the insurance. In the United States there is no similar law, and as convoy has rarely been provided by government, and has been in very little use, this warranty does not appear in American policies, and should it hereafter be introduced, it will no doubt be under laws and usages different from those of Great Britain.

It was long ago decided that this warranty was complied with by taking such convoy as was provided by the government for vessels bound on the voyage insured, and if convoy was usually furnished for only a part of the voyage, it was no breach of the warranty to perform the remainder without any convoy.^(a)

Warranty to sail with convoy, or which is the same in this respect, to depart with convoy, is a warranty to take convoy for the whole voyage, or for that part of it for which convoy is usually supplied by the government.⁽¹⁾

The vessel must not only sail with the convoy,⁽²⁾ but the captain must also, either before, or at the time of sailing, take sailing orders, or directions as to keeping with the convoy, obeying signals and the like, from the commander of the convoy, except, perhaps, where he is unavoidably prevented, without any fault on his part, from receiving such orders, in which case he must take the earliest opportunity of obtaining them.⁽³⁾

But if the vessel cannot sail fast enough to keep with the convoy, or be parted by a storm or other inevitable accident, it is not a breach of the warranty.⁽⁴⁾

Section 5. *Neutral Property. Ownership.*

A warranty that the ship or goods are *neutral*, or *neutral property*, is an engagement on the part of the assured, that it is owned by persons resident in a country at peace when the risk begins, and who have the commercial character of subjects of such country, and that it shall be accompanied with such documents, and shall be so managed and conducted by the assured and their agents, as to be entitled, as far as depends on them, to all the protection and privileges of property belonging to the subjects of such country. And so a warranty that the property is Dutch or American, or of any particular national character, is an engagement that it is owned by persons having the commercial character of Dutchmen or Americans, or of the subjects of such other nation, and that it shall be so documented, and so conducted by the assured and their agents, as not to forfeit, as far as depends on them, any of the advantages to which the property of the subjects of such nation is entitled. If the property insured is warranted to be American, at a time when the United States are at peace, it is precisely the same as a warranty of neutrality, and these two forms of warranting are used indifferently for the same purpose.

A statement of the fact that the property is neutral, whether incidentally or directly, whether as a part of the description of

- (1) *Lilly v. Ewer*, Doug. 72.
 (2) *Taylor v. Woodness*, Park, 510.
 (3) *Webb v. Thompson*, 1 B. & P. 5;
Victorin v. Cleeve, 2 Str. 1250;
Anderson v. Pitcher, 2 B. & P. 164;
 3 Esp. 124;
Waltham v. Thompson, 1 Marsh. Rep. 376;
Verdon v. Wilmot, Park, 500. n.
 (4) *Manning v. Gist*, Marsh. 367;
Simond v. Boydell, Doug. 268;
Jefferies v. Legendra, 4 Mod. 58;
 2 Salk. 443.

How this warranty may be made.

(a) *Bond v. Gonsales*, 2 Salk. 445; *Smith v. Readshaw*, Park, 510; *Hibbert v. Pigou*, Park, 498; *Gordon v. Morley*, 2 Str. 1265; *Lethulier's case*, Salk. 443; *D'Eguino v. Bewicke*, 2 H. Bl. 551; *Audley v. Duff*, 2 B. & P. 111; *Everard v. Hollingsworth*, 2 B. & P. 111. n.; *Campbell v. Bourdieu*, 2 Str. 1265; *De Garey v. Clagget*, Park, 511; *Warwick v. Scott*, 4 Camp. 62.

(1) *Sleight v. Rhinelanders*, 1 Johns. 192.

Property warranted neutral must be owned by neutrals.

(2) *Supr.* 29. & seq.

(3) *Skin.* 327.

If the warranty be falsified as to a part of the property this defeats the contract.

(4) *Calbraith v. Gracie, Condy's Marsh.* 388.

n.; *Goold v. Unit. Ins. Co.* 2 Caines, 73.

(5) *Livingston v. Maryl. Ins. Co.* 6 Cranch, 274.

Property held in trust for a belligerent.

(6) *Murray v. Unit. Ins. Co.* 2 Johns. 168.

Property sold by a neutral to a belligerent, to be delivered in the belligerent country.

(7) *Ludlow v. Bowne*, 1 Johns. 1.

(8) *The Sally*, 3 Rob. 300.

n.; *The Atlas*, 3 Rob. 299; *The Anna Catharina*, 4 Rob. 107, 113. *n.*

the property, or in the form of warranting, will equally constitute a warranty. So the warranty of a fact necessarily implying the neutral or national character of the property, will have the same construction as a formal and direct warranty to this effect. Where a policy effected in the United States contained the following note; '*N. B. The vessel sails under a sea-letter*;' it was held to be a warranty of American property.(1)

It has already appeared that the national character of any person, for all commercial purposes, depends upon his domicile, and he is taken to have the commercial character of the nation where he has his residence.(2) What has been said in regard to national character, is applicable to the present subject, but need not be repeated. If property be insured as belonging to the subjects of any particular country, as Hamburgers, which is owned by the subjects of another, as Frenchmen,(3) or if it be warranted to belong to neutrals, when it is owned by belligerents, the insurers are not bound by their subscription.

A falsification of the warrants, in regard to a part of the property insured, will defeat the policy as to the whole.(4)

Where the assured being neutrals were part-owners of goods, the other part-owner being a belligerent, and the policy was intended to cover only the interest of the neutral part-owners, Chief Justice Marshall said, 'The assured are not understood to warrant that the whole cargo is neutral, but that the interest insured is neutral.'(5)

A vessel warranted American had been conveyed by John Bazing, an American, to Murray and Hart, Americans also, by a bill of sale absolute in its terms, but in fact in trust for Nathaniel Bailey, of Jamaica, a British subject and belligerent, as security for a debt due to him from Bazing; it was held that the warranty was not complied with. Mr. Justice Radcliff said, 'A warranty of neutrality requires that the property should be wholly neutral. If one of the belligerents had an interest, whether partial or entire, the risk was thereby increased, and the warranty not complied with.'(6)

During a war between France and England, an agreement was made by an American for a sale of goods to Frenchmen, to be delivered at St. Vallery, in France, but the goods were to be at the risk of the vender until delivered. Under this agreement the goods were shipped and insured with a warranty that they were American. It was the opinion of the court in New York that the warranty was complied with, from which, however, Mr. Justice Kent dissented.(7) So if goods be contracted for with a belligerent to be delivered to a neutral in a neutral country, the goods retain their belligerent character until they are delivered according to the agreement.(8) And in opposition to the above decision in New York, it has been decided in the House of Lords, in England, that property going to be delivered in the belligerent country, and under a contract to become the property of the belligerent immediately on arrival, if taken *in transitu*, is to be considered as belligerent property, unless the contract is made in time of peace and without any contempla-

tion of a war.'(1) Upon the authority of this case Sir William Scott decided that goods sold at Vigo, by an American merchant, to the Spanish government, to be delivered at Seville, and paid for when delivered, and to be at the risk of the vender until so delivered, became, by this contract, Spanish property.(2)

The property must not only be owned by neutrals at the commencement of the risk, but must continue to be so, as far as depends on the assured or owners. Dollars were insured and warranted Danish property. They belonged to one Ferrall, of St. Croix, who assigned half of his interest in them to Amoresta, a Spaniard and belligerent, to secure him for advances. This was held to be a breach of the warranty. The court said the property must not cease to be neutral by the act of the assured.(3)

The warranty is, that the property is neutral at the beginning of the risk, and shall continue to be so, as far as this depends on the assured or his agents. But if he becomes a belligerent, or the property assumes a belligerent character immediately after the risk commences, by an act of his government, or that of any other government, it is not a breach of the warranty. This is one of the risks taken by the insurers.(4)

Section 6. *Origin of Property Warranted Neutral.*

Property, though owned by persons domiciled in a neutral country, may yet be in itself of a belligerent character. The produce of a belligerent colony, shipped directly from the colony to the mother country, by whomever owned, has been held in England to be belligerent property; but if owned by neutrals, and exported from such colony for a neutral country, it is neutral both during the exportation to the neutral country, and its re-exportation thence to a belligerent one. The question in such cases always is, whether an importation is intended, or whether there has been an actual importation, into the neutral country, or whether the whole transportation from the colony to the mother country, is one entire voyage.

Goods warranted Dutch were taken on board at St. Eustatia, a Dutch island, part of them from on shore, and a part from barks; and it was suggested that some of the barks had come from French islands in the West Indies, and from these, the goods were taken on board of the vessel without having been landed at St. Eustatia. Lord Mansfield said, 'It is now a settled point that it is the same thing as if they had been landed on the Dutch shore, and put on board afterwards,' in which case he thought there could be no question as to their neutrality.(5)

This decision, like many others since given in Great Britain, proceeds upon the principle that a neutral country cannot, during a war, carry on a trade between a belligerent country and its colonies, not permitted in time of peace. But this principle has been strongly opposed in the United States; where it has been held that the participation in such a trade by a neutral, is only accepting a favour from the belligerent country, which the neutral has a right to accept, and that the circumstance of the

(1) *The Sally*, 3 Rob. 300. n. A. D. 1795.

(2) *The Atlas*, 3 Rob. 299.

The property must not be sold to a belligerent during the risk.

(3) *Goold v. Un. Ins. Co.* 2 Caines, 73.

If the property becomes belligerent without the act of the assured or his agent, it is not a breach.

(4) *Eden v. Parkinson*, Doug. 732; *Garrels v. Kensington*, 8 T. R. 234; *Saloucci v. Johnson*, Park, 556.

Colonial trade of a belligerent carried on by a neutral.

(5) *Berens v. Rucker*, 1 Bl. 313.

(1) *Vasse v. Ball*, 2 Dall. 270.

(2) See Wait's *American State Papers* for 1806, and the following years.

(3) *The Phoenix*, 5 Rob. 20.

(4) *The Rendsborg*, 4 Rob. 121; *The Jan Frederick*, 5 Rob. 128.

(5) *The Vrow Anna Catharina*, 5 Rob. 161.

(6) *The Anna Catharina*, 4 Rob. 118.

(7) *The Susa*, 2 Rob. 251; *The Portland*, 3 Rob. 41.

See also *the St. Jose Indiano*, 2 Gal. 268; *Society &c. v. Wheeler*, 1 Gal. 130.

(8) *Coolidge v. N. Y. Firem. Ins. Co.* 14 Johns. 314; *Higgins v. Livermore*, 14 Mass. Rep. 106; *Barker v. Phoen. Ins. Co.* 8 Johns. 237; *Goix v. Low*, 1 Johns. Cas. 346; *Barzillay v. Lewis, Park*, 526; *Blagge v. N. York Ins. Co.* 1 Caines, 549.

The flag. (9) *The Success*, 1 Dodson, 131; *The Vrow Elizabeth*, 5 Rob. 2.

The sea-letter.

goods being of colonial origin, and the trade being a branch of the colonial trade of a belligerent, is not a breach of the warranty of neutral property.(1) This question has been the subject of much discussion between the governments of the United States and Great Britain.(2)

As there seems not to be any well settled and generally adopted principle of the law of nations on this subject, it can only be said, that, to comply with the warranty of neutrality, the property must, in respect to its origin, and to the trade of which it constitutes a part in time of peace, be such as is recognised to be neutral by the courts of the country where the contract is made.

The produce of a plantation of a colony of a belligerent country, though owned by a neutral, has been held by Sir William Scott to be of a belligerent character.(3) And he gave the same opinion respecting the produce of a belligerent colony contracted for by a neutral in contemplation of war.(4) But if the produce be delivered before the declaration of a war, it is neutral.(5)

Property derived from, or employed under, a contract of a neutral with a belligerent government for a privileged trade, is held by Sir William Scott to have a belligerent character.(6) And he considered the interest of a neutral in a house of trade established in a belligerent country to have the national character of such country.(7)

Section 7. Property warranted Neutral must be accompanied with Proofs of its Neutral Character.

Under this warranty the ship or goods must not only be owned by neutrals, and not be of a belligerent character in themselves, but they must also be accompanied by sufficient tokens and documents to show that they are entitled to be respected as neutral property. What evidence is requisite in this respect, depends upon the law of nations, and the laws and treaties of the country to which the ship and the owner of the property belong. It cannot be said precisely what documents will be sufficient to answer the warranty, since the municipal regulations and treaties of a country are liable to change. The warranty requires, in general, that the ship or cargo should be accompanied with unequivocal evidence of its national character.(8)

The flag is the most obvious badge of the national character of the ship, and by the law of nations the ship is liable to be considered as belonging to the nation indicated by its flag.(9) A ship warranted neutral must therefore bear no other than the flag of a nation that was neutral at the commencement of the risk, and one warranted of any particular national character, must bear no other flag than that of the nation to which the warranty relates.

The same rule is adopted respecting the ship's *sea-letter* or *pass*, which is a certificate granted, directly or indirectly, by the supreme authority of a nation, declaring that the ship sails under

the protection of such nation, and expressly or by implication giving notice to all people, that she is to be so regarded. The national character of the vessel is therefore explicitly avowed by the sea-letter, and it is not permitted to disown the character thus formally assumed.(a)

In a policy on goods from New York to New Orleans, the assured warranted that 'the vessel sailed under a sea-letter;' and a question was made as to the meaning of this term. The vessel had on board a certificate of the collector and naval officer of the port of New York, stating that the assured had made oath that the vessel was wholly owned by himself and other American citizens, and that no citizen of any foreign state had any interest, directly or indirectly, in the vessel. The assured offered to prove that this certificate of ownership was commonly understood and known in New York as a *sea-letter*. On behalf of the underwriters it was insisted, that the laws and treaties of the United States defined a *sea-letter* to be a paper under the seal of the United States, subscribed by the President, and declaring that the master had made oath that the vessel belonged to citizens of the United States, and that permission had been given to export the cargo put on board. The form of this paper had been prescribed in the treaty of 1778 with France, of 1782 with the Netherlands, and of 1795 with Spain, where it is called a sea-letter. By an act of Congress, of June, 1796,(1) the secretary of state was authorized to prepare the form of a *passport*, which being approved by the President, should be deemed a passport for vessels of the United States. Under this law the same form was adopted which had been agreed upon in the above treaties. By another act of Congress of March, 1803,(2) it was provided that every unregistered vessel owned by citizens of the United States, and sailing with a *sea-letter*, should, at the request of the master, be furnished by the collector with a passport of the form adopted in pursuance of the preceding act. This last act makes a distinction between a *sea-letter* and a *passport*; by a *sea-letter* it seems to mean the certificate of ownership. The court, however, understood a passport and sea-letter to be the same document, the form of which they held to be so definitely settled by the treaties above-mentioned, and the act of 1796, that no parol evidence could be admitted to show that any other document was to be understood by a *sea-letter* within the warranty.(3)

The court of errors, however, reversed this decision and permitted the parties to prove what was understood in New York by the term *sea-letter*; and it appeared, by the evidence, to be the certificate of the collector and naval officer. As the vessel sailed with this certificate on board, it was held that the warranty had been complied with.(4)

(a) *The Vigilantia*, 1 Rob. 11; *The Vrede Scholtys*, 5 Rob. 5. n. See 6 Wheat. App. 12, for what is considered to be a sea-letter in France, p. 36, for the form agreed upon by the United States and Holland in 1782, and p. 58, for that agreed upon by Great Britain and Russia in 1801.

The ship is warranted to sail with a sea-letter.

(1) Laws U. S. v. 2. c. 339.

(2) Laws U. S. v. 3. c. 329.

(3) *Sleight v. Rhineland*, 1 Johns. 192.

(4) *Sleight v. Hartshorn*, 2 Johns. 531.

It cannot be requisite that a vessel warranted neutral, or of any particular national character, must in all cases, to comply with the warranty, have a sea-letter corresponding to it; since it depends upon the government of a country to give such letter. The warranty can only require that the vessel shall have such documents to show its national character as the government will furnish, or the owners can procure. But as it is a very general practice of governments to provide, in time of war, for granting sea-letters to vessels, the warranty will, in general, be equivalent to a stipulation that the vessel shall be supplied with this document. And where the government would furnish it if applied for, and it is usual to have it on board, it is a breach of the warranty to be without it.

The Register.

The register is an important document under this warranty, as it shows to whom and to what port a vessel belongs, and is certified by some officer of the customs, and accordingly bears with it some stamp of public authority.

(1) *Barker v. Phoen. Ins. Co.* 8 Johns. 237.

The shipping-paper, muster-roll, and log-book.

The cargo must be accompanied by proofs of national character.

These two documents constitute the most material proof of the national character of the ship. But it depends on the laws, and usages, and treaties of a country, whether either of them is absolutely necessary under a warranty of national character. Where a vessel warranted American, had a sea-letter but no register, this was held to be a compliance with the warranty.(1)

The shipping-paper, bill of sale, muster-roll or role d'équipage, and log-book, must show, as far as they exhibit any proofs, that the vessel is of the national character warranted.

In regard to the cargo, it must, under this warranty, be accompanied by sufficient proof of its national character; the invoices, bills of lading, the letters relating to the goods, and the certificates of consuls or other officers, must all be consistent with, and confirm the warranty.

(2) *Griffith v. Ins. Co. of N. A.* 5 Bin. 464; *Siffken v. Lee*, 2 N. R. 484.

(3) *Livingston v. Maryl. Ins. Co.* 7 Cranch, 536.

Concealment of papers.

In all the cases on this subject this warranty is held to require that the property should be owned in compliance with the warranty, and be furnished with the *usual documents* of national character.(2) Belligerent nations have not a right to prescribe to neutrals by what vouchers their title to their property shall be authenticated. But the right of throwing the burthen of proof upon the neutral is conceded to them by general usage, or in other words, by the law of nations. By declaring war against each other, they seem, by general consent, to acquire the right of demanding of neutrals the proof that their property on the ocean is entitled to exemption from capture. And a warranty of neutral property is an engagement that this proof shall accompany the property, and be forthcoming whenever its national character is called in question; since if it be not ready to be produced, the vessel is liable at least, to detention until it can be furnished. Under this warranty therefore, the property must be accompanied by documents of some description, and sufficiently authenticated, to prove beyond a reasonable doubt, that the property is of the national character warranted.

Chief Justice Marshall says, 'that in general the concealment of papers amounts to a breach of the warranty;'(3) and the

carrying a material paper written in sympathetic ink, seems to be equivalent to a concealment of papers.(1)

As the ship is bound by its flag and passport, so is the cargo by the papers. Accordingly, if a cargo warranted neutral be accompanied with simulated papers, giving it the appearance of being the property of belligerents, though such papers are taken merely for the purpose of evading the municipal regulations of trade of a belligerent, which is held to be justifiable, yet the cargo is liable to be considered by the other belligerent as of the assumed national character; or is in so great danger from this cause, that the use of such papers is held to be a violation of the warranty of neutrality.(a) But if leave be given in the policy to carry simulated papers, it is not a breach of the warranty to have them on board.(2) And chief Justice Marshall says, that when the underwriters know, or ought to know, that, by the usage of the trade, two sets of papers are carried to protect the property, they impliedly consent to the usage, and the set of papers, which will protect the property, when its national character is called in question, is to be produced.(3)

An attempt on the part of the captain to disguise belligerent goods as neutral, is a breach of the warranty in respect to other parts of the cargo. At the time of Spain's being at war, the captain of a vessel took on board Spanish goods at Havana, which he disguised and represented as neutral. Those who had shipped the remaining part of the cargo, and warranted it neutral, forfeited their insurance by this act of the captain. The court said, 'The whole property of the assured on board the ship was liable to condemnation by the law of nations, if their general agents attempted to deceive one of the belligerent powers by covering the property of his enemy.' But if the same goods had been taken on board as Spanish, and so documented and represented, it would not have been a breach of the warranty in regard to the other goods.(4)

As the captain is more directly the agent of the owners of the ship, than of the shippers of goods, there is a still stronger reason why such an attempt on his part should be a forfeiture of the warranty that the ship is neutral.(5) And so if the owner of the ship insured with this warranty, lends his name to protect belligerent goods as neutral, by shipping them in his own name, it is a breach of the warranty.(6)

The law of nations, in regard to what is to be considered neutral property, and in regard to the conduct necessary to secure it respect as such, is liable to be controlled by treaty, since nations may substitute express rules for those implied obligations which the general law imposes without any stipulation. And

(1) *Carrere v. Un. Ins. Co.* 2 Hall's Law Journal, 197.

Simulated papers.

(2) *Bell v. Bromfield*, 15 East, 364.

(3) *Livingston v. Maryl. Ins. Co.* 7 Cranch, 536.

Disguising belligerent goods as neutral.

(4) *Phoen. Ins. Co. v. Pratt*, 2 Bin. 308.

(5) *Schwartz v. Ins. Co. of N. A. Whart. Dig. h. t.* 46.

(6) *The Fortuna*, 3 Wheat. 236.

(a) *Honeyer v. Lushington*, 15 East, 46; *Oswell v. Vigne*, 15 East, 70; *Blagge v. N. Y. Ins. Co.* 1 Calnes, 549. Sir James Mansfield makes a query whether a neutral vessel may carry simulated papers. *Steel v. Lucy*, 3 Taunt. 285. Mr. Park, p. 531, says this query is answered by the above cases in East.

modifications of the law of nations in these respects have been made in many different treaties.^(a)

Sea-letter not on board at the commencement of the voyage.

(1) A. 23 & 25.

The United States and France made stipulations of this sort in the treaty of 1778, in which it was agreed that in case of either party being at war, the other being neutral, the vessels of the neutral party, being furnished with a sea-letter and other documents, should not be molested by the cruisers of the other.⁽¹⁾ France being at war, the ship *Atlantic* was insured in England 'from London to Guernsey, the coast of Africa, and America,' with a warranty that she was American. The ship sailed on the voyage, but did not take a sea-letter until she arrived at Guernsey. The ship was captured by the French in a subsequent part of the voyage, after having taken a sea-letter, which was on board at the time of the capture. But nothing could be recovered of the insurers because the warranty had not been complied with, as the sea-letter had not been on board from London to Guernsey, and the vessel was therefore during that part of the voyage not entitled to all the privileges of an American vessel, as the treaty implied that a vessel without a sea-letter might at least be detained, if not condemned.⁽²⁾

(2) *Rich v. Parker*, 7 T. R. 701.

Captain's place of residence mentioned in the passport.

In the same treaty it was also stipulated that, in case of war, the sea-letters of the vessels of the neutral party, to entitle them to the exemption agreed upon, should express 'the place of habitation of the master.' The *Mount Vernon*, being insured in England and warranted American, had a sea-letter running as follows; 'Permission has been granted to George G. Dominick, master of the ship called the *Mount Vernon*, of the town of Philadelphia, of the burthen,' &c. Lord Ellenborough said, the name of the town in the passport referred to the ship, not to the master, and that the vessel not being navigated according to the treaty had forfeited her neutrality.^(b)

Section 8. Warranty of Neutral Property requires Neutral Conduct.

It is not only necessary that property warranted neutral should be neutral in itself, and accompanied by sufficient evi-

(a) Answer to the Prussian Memorial, Col. Jurid. v. 1. p. 137. See treaties of the United States with European powers; *Laws of U. S.* vol. 1. Ed. of 1815.

(b) *Baring v. Christie*, 5 East, 398. See also *Baring v. Claggett*, 3 B. & P. 201, on the same facts. The case turns upon the vessel's not being entitled to a register, from which Lord Alvanley and the other judges supposed she was not entitled to the privileges of an American vessel. Chief Justice Kent supposes, 8 Johns. 320, that Lord Alvanley did not know of any other act of Congress than that of 1792 on this point, and seems to think that his opinion would have been different, had he known of that of 1802, giving vessels not entitled to a register but owned by citizens of the United States, all the advantages of national protection. See also *Baring v. Roy. Ex. Ass. Co.* 5 East, 99.

lence of its being so, but also that the assured and his agents who have the control of the property, should so conduct the voyage and employ and manage the property, as not to forfeit its neutral character.

The public armed ships of a belligerent have a right to bring on board and search neutral merchant vessels, that is, to go on board of them and examine the ship's papers and those relating to the cargo, and put questions to the captain or other officers touching the neutral character of the property, and, in general, to examine the property, the papers by which it is accompanied, and the persons having charge of it, for the purpose of ascertaining whether it is belligerent or neutral. This right is sometimes conceded with reluctance by neutrals, and as often enforced with rigour by belligerents. It has been rendered so inconvenient, that many attempts have been made to limit and regulate its exercise, particularly by Prussia, Holland, and Sweden, about the middle of the last century,⁽¹⁾ and again in 1780 by Russia and the other members of the Armed Neutrality.

Neutral property is subject to the right of search.

(1) Collect. Jurid. v. 1. p. 144. Answer to the Prussian Memorial, 1 Rob. 365. n.

In a case before the court of King's Bench, in 1785, it was held that neutrals are under no obligation to submit to search, or in other words, that resisting search is not a forfeiture of neutrality. It was the case of a Tuscan ship, the *Thetis*, warranted neutral, on a voyage from Leghorn to London. She was captured by a Spanish vessel, and condemned as prize in Spain, on the ground that she had resisted search by firing into the Spanish ship demanding to make search, after the Spanish colours were hoisted. Willes J. said, 'If a neutral ship be stopped, those who stop her must pay for her detention. But it is said she must stop to be searched. I find no authority for this position. Stoppage is always at the peril of the captors.' Ashhurst, J. said, 'I do not find that a neutral ship must submit to be searched. It is rather an act of superior force always resisted when the party is able; and the right falls within this position, that the searcher does it at his peril. If he find any thing contraband or the property of an enemy, he is justified; if not, he pays costs.' Buller J. said, 'The answer given to the claim of search is conclusive, that the party does it at his peril; just like the case of a custom-house officer. The practice of the admiralty confirms it; for they give costs in cases of improper detention, which they would not do, if ships were at all events liable to be stopped.'⁽²⁾

The right of search.

(2) *Salouci v. Johnson*, Park, 566.

In a case before the same court in 1799, a different opinion is given as to the right of search. Lord Kenyon said, 'Before the late armed neutrality, it was considered in this country, and so decided in many cases, that the right of searching neutrals is part of the law of nations; and it was supposed to be founded in reason.'⁽³⁾

(3) *Garrels v. Kensington*, 8 T. R. 234.

This question is elaborately considered by Sir William Scott, in the case of a fleet of Swedish merchant ships laden with iron, hemp, tar, and pitch, on a voyage from Sweden to various ports of the Mediterranean, under the convoy of a Swedish frigate. The acts of the frigate and merchantmen were construed to be

a resistance of search; respecting which that judge said, 'that the right of visiting and searching merchant ships upon the high seas, whatever be the ships, whatever be the cargoes, whatever be the destinations, is an incontestible right of the lawfully commissioned cruisers of a belligerent nation. I say, be the ships, the cargoes, and the destination, what they may, because till they are visited and searched, it does not appear what the ships or the cargoes or the destinations are; and it is for the purpose of ascertaining these points that the necessity of this right of visitation and search exists. This right is so clear in principle, that no man can deny it who admits the legality of maritime capture; because if you are not at liberty to ascertain by sufficient inquiry, whether there is property that can be legally captured, it is impossible to capture. Even those who contend for the inadmissible rule that *free ships make free goods*, must admit the exercise of this right, at least for the purpose of ascertaining whether the ships are free ships or not. The right is equally clear in practice; for practice is uniform and universal upon the subject. The many European treaties which refer to this right, refer to it as one existing, and merely regulate the exercise of it. All writers upon the law of nations unanimously acknowledge it, without the exception even of Hubner himself, the great champion of neutral privileges. In short, no man in the least degree conversant in subjects of this kind has ever, that I know of, breathed a doubt upon it. The right must unquestionably be exercised with as little personal harshness and vexation in the mode as possible; but soften it as you can, it is still a right of force though of lawful force—something in the nature of a civil process, where force is employed, but a lawful force which cannot be lawfully resisted. For it is a wild conceit that wherever force is used it may be forcibly resisted; a lawful force cannot be lawfully resisted.' He adds, that if the right of search exists, the presence of an armed neutral ship acting as convoy, does not take it away; it may prevent the exercise of the right if it be the superior force, but this will not affect the right itself.(1)

Chief Justice Parsons says, that 'neutral powers should always be willing to allow the belligerents those rights and powers which have been established and practised upon for ages; looking to the time when they may be obliged to claim and exercise the same.'(2)

The right of search regulated by treaties.

Resistance of search forfeits the warranty.

The treaties of the United States with the European powers recognise the right of search, and provide regulations for the exercise of the right.

The neutral being under an obligation to submit to search when it is legally demanded, and as far as the right is legally exercised, it is a violation of neutrality and a breach of this warranty to resist it; and so it has been held in numerous cases.(3)

The right of search includes that of sending a vessel into port for examination; for it would be to no purpose to permit search, without permitting, as incident to it, the right to send the neutral

(1) *The Maria*, 1 Rob. 360.

(2) *Robinson v. Jones*, 8 Mass. Rep. 539.

(3) *McLellan v. Maine F. & M. Ins. Co.* 12 Mass. Rep. 246; *Snowden v. Phœn. Ins. Co.* 3 Bin. 457; *Robinson v. Jones*, 8 Mass. Rep. 536.

into port for the more satisfactory examination of the national character of the property, in cases where there is reasonable ground of doubt. It is therefore a breach of the warranty in the captain and crew of a neutral vessel, sent into port under these circumstances, to attempt to rescue and regain possession of the vessel. It is considered a resistance of the right of search.⁽¹⁾

It is not easy to say precisely what acts may be lawfully done in the exercise of the right of search. Hubner thinks it should be confined to the examination of the papers.⁽²⁾ But it has not been so limited in practice, and in considering the liability of the captors to pay costs and damages for the abuse of this right, courts have permitted them, in justification of their conduct in detaining neutral vessels, to give evidence of every circumstance that came to their knowledge, tending to throw suspicion upon the national character of the property.

The principle acted upon seems to be, that the belligerent cruiser may, when its character and commission are made known, take every reasonable means, without using any unnecessary force or violence, to ascertain the national character of the vessel and cargo, and if any circumstance, from whatever source a knowledge of it may be obtained, gives a reasonable ground to doubt the neutral character of the property, it will justify a detention of the vessel. But where the manner of making search is regulated by treaty, as it has been in some of the treaties of the United States with foreign powers, the express stipulations of the parties will determine what is a legal mode of search.

It seems to be implied, in many cases, that neutrals are obliged to submit to be searched and detained at the discretion of a known belligerent. Chief Justice Parsons says, 'The belligerent having a right by the law of nations, to visit and search neutral vessels to prevent them from entering or leaving a port under lawful blockade; to seize and detain them if engaged in contraband trade, or violating a blockade; and to capture and carry into port neutral vessels, which may be transporting the property of his enemy, for the purpose of condemning such property:—it would be utterly inconsistent with these rights to allow the neutral to resist by force, or be retaken by her crew, whenever they might have opportunity to overpower the officers and men of the belligerent in whose custody she might be placed. General principles of policy require that in such cases the neutral should submit, and rely upon the justice of the tribunals of the belligerent nation.'⁽³⁾ Similar language is held in many cases, from which it appears plainly that the power to resist, or opportunity to escape, does not lessen the obligations of a neutral to submit to search. This seems to be the principle to which the preceding, and other like observations, are applicable; for it can hardly be supposed that the neutral is legally and absolutely bound to submit to all acts done by a belligerent, under a pretence of exercising a right of search, though the belligerent make known his character and produce his commission.

(1) *Wilcocks v. Union Ins. Co.* 2 Bin. 574; *The Maria*, 1 Rob. 360; *Garrels v. Kensington*, 8 T. R. 230.

What is a legal exercise of the right of search.

(2) Chap. 2.

Whether a neutral is bound to submit to acts done by a belligerent under a pretence of exercising the right of search.

(3) *Robinson v. Jones*, 8 Mass. Rep. 538.

It is a general principle that the unlawful exercise by force of a legal right, will justify a resistance. As to the discretion of the parties, each has the same, and neither can alter the rights, powers, or obligations of the other, by the construction he puts upon them. The belligerent uses his discretion as to the manner of searching, and the neutral as to the right or expediency of resisting or escaping; but still it remains for the proper tribunals to determine what were, in truth, the rights and obligations of the parties.

Search illegally made may be forcibly resisted.

If a belligerent exercises the right of search illegally, it is not a breach of the warranty of neutrality to make resistance. It was so decided in regard to an American vessel captured by a lugger in the English Channel near the French coast. The prize crew were proceeding with the vessel towards a French port, when the American crew rose upon them and regained possession of the vessel, but were obliged to abandon her, in their boat, on the lugger's again appearing in sight and giving chase to them. The lugger had neither shown any colours nor made known the authority by which a right of search was demanded. This was held to be a sufficient justification of resistance. Mr. Justice Jackson, giving the opinion of the court, said, that to refuse the right of resistance and escape in such case, 'would expose every neutral ship to capture by pirates. The master of the neutral vessel had no evidence that the capturing ship was a French commissioned cruiser. The captors might have plundered the ship and sunk her, and neither the owners nor the government of the United States could demand indemnity against the French government.'(1)

(1) *McLellan v. Maine F. & M. Ins. Co.* 12 Mass. Rep. 246.

Chief Justice Tilghman instructed the jury, in regard to a neutral vessel captured and sent in for adjudication, that the crew was not obliged to navigate her. 'The captors should put sufficient force of their own on board. Should they send out a single hand, or so few that it was manifestly impossible to work her, this would not be taking sufficient possession. In that case the neutrals are not obliged to submit their property and lives to the mercy of the winds and waves, and may lawfully consider her as abandoned to them and act accordingly. But if a force insufficient to work the vessel is put on board by the captors, in consequence of the promise of the neutral crew to navigate her to the destined port, they are bound by such promise, and must be considered, for the purpose agreed upon, as the hands of the captors. If in violation of their promise they take the vessel, I am of opinion that it is an unlawful rescue.'(2)

(2) *Wilcocks v. Union Ins. Co. Condry's Marsh.* 534. n.

Sailing under belligerent convoy.

It has been decided in one case, in Pennsylvania, that sailing with belligerent convoy is not a breach of the warranty of neutrality. But the court considered this to be justifiable on the ground that the Milan decree, against the operation of which it was intended by this means to protect the property, 'put neutrals in a state of outlawry, and stripped the vessel of her neutral character.'(3) The court considered the French decree as hostile in some sort to neutral nations, and were accordingly of opinion that it might as such be resisted or evaded by them.

(3) *Snowden v. Phœn. Ins. Co.* 3 Bin. 457.

This circumstance makes the case an exception to the general rule, which is, that sailing under belligerent convoy, is a forfeiture of neutrality, where the vessel puts itself under this protection for the purpose of resisting or avoiding being searched by the other belligerent.⁽¹⁾

It has been held not to be a breach of the warranty of the neutral character of the ship, that she carries a belligerent cargo.⁽²⁾ And there seems to be similar ground to hold that the warranty on goods is not forfeited by the circumstance of their being transported on board of an unarmed belligerent ship. But upon the principle assumed by Sir William Scott, it would be a violation of this warranty to ship the goods by a public armed vessel of a belligerent, since it would be putting them under belligerent protection. Chief Justice Marshall says, 'The rule that the goods of an enemy found in the vessel of a friend are prize of war, and that the goods of a friend in the vessel of an enemy are to be restored, is believed to be a part of the original law of nations as generally, perhaps universally, acknowledged. It has been fully and unequivocally recognised by the United States. And it was held that the provision of the treaty of the United States with Spain, that 'free ships should make free goods,' was not a ground for considering all goods that were claimed as Spanish, but found on board of an armed hostile vessel to be, for this reason merely, enemy property.

Mr. Justice Story said, 'The general doctrine, though formerly subject to many learned doubts, is now incontrovertibly established, that neutral goods may be lawfully put on board of an enemy ship, without being prize of war.'⁽³⁾

A cargo does not lose its neutral character by being shipped in a vessel that formerly sailed under belligerent protection. An insurance for a voyage from Surinam to the United States was made on a cargo warranted neutral, which was captured and was condemned in a British vice-admiralty court, on the ground that the vessel had, in a previous voyage, sailed under the license and protection of the enemies of Great Britain. The insurers resisted the claim for a loss, on the ground that there had been a breach of the warranty. But the court thought otherwise. Radcliff, J. said, 'Admitting the vessel to have been formerly employed in illicit trade, it would not affect the cargo of this voyage'—Kent, J. 'The unlawful trade that the owner and his vessel might have been engaged in formerly, could not vitiate or poison a subsequent lawful traffic.'⁽⁴⁾

'If, says Vattel, I lay siege to a place or only form a blockade, I have a right to hinder any one from entering, and to treat as an enemy any one who attempts to enter the place, or carry any thing to the besieged, without my leave.'⁽⁵⁾ The belligerent having this right of intercepting all communication with a besieged or blockaded place, a neutral accordingly has no right of keeping up any communication with such place, and an attempt to violate the siege or blockade is a breach of neutrality. 'On principle it might well be questioned whether the right to confiscate vessels bound to a blockaded port can be applied to

(1) *The Maria*, 1 Rob. 340; *The Joseph*, 1 Gal. 548; *The Julia*, 8 Cranch, 181.

A ship warranted neutral may carry a belligerent cargo, and goods warranted neutral goods carried in a belligerent ship.

(2) *Barker v. Blakes*, 9 East, 283.

(3) *The Ne-reide*, 9 Cranch, 388.

The previous employment of the ship under the protection of a belligerent, is not a forfeiture of the warranty that the cargo is neutral.

(4) *Kemble v. Rhinelanders*, 3 Johns. Cas. 130.

The right of blockade.

(5) 1. 3. c. 7. s. 117.

a place not completely invested by land as well as by sea. If we examine the reasoning on which is founded the right to intercept and confiscate supplies designed for a blockaded town, it will be difficult to resist the conviction that its extension to towns invested by sea only, is an unjustifiable encroachment on the rights of neutrals.^(a)

A blockade requires an adequate force.

- (1) *The Vrouw Judith*, 1 Rob. 150. See *The Byfield*, 1 Edw. 188.
 (2) *Radcliff v. Unit. Ins. Co.* 7 Johns. 54; *The Frederick Molke*, 1 Rob. 86; *The Columbia*, 1 Rob. 156;
The Juffrow Maria Schroeder, 3 Rob. 155.
 (3) *The Rolla*, 6 Rob. 372.

A blockade must be declared by sufficient authority.

- (4) *The Henrick and Maria*, 1 Rob. 146; *The Rolla*, 6 Rob. 364.

Notification of the blockade is requisite.

But according to the usage under the law of nations, the belligerent has a right to blockade a place and cut off all communication by sea, although it is not at the same time besieged. Notwithstanding the late practice of Great Britain and France, of declaring ports in a state of blockade, although not actually invested by an adequate naval force, it has always been held that a place is not blockaded, so as legally to intercept the intercourse of neutrals, unless a force is present for the purpose of maintaining the blockade, sufficient to cut off all communication by sea, or to make an entry imminently dangerous.^(b) Sir William Scott says, 'A blockade is a sort of circumvallation, by which all correspondence and communication is, as far as human force can effect it, to be entirely cut off.'⁽¹⁾ But if the blockading squadron is occasionally blown off, the commander retaining the purpose of returning to the station immediately, and using due diligence for this purpose, this does not suspend the blockade.⁽²⁾

A blockade is properly a uniform and universal exclusion of vessels; if therefore some vessels are permitted to pass, others have a right to infer that the blockade is raised. Such a mode of keeping up a blockade destroys its effect. Accordingly, as there is no valid blockade, there can be no breach of blockade.⁽³⁾

A declaration of blockade is said to be a high act of sovereignty, and it is usually made directly by the government to which the blockading squadron belongs. A blockade is, however, in some cases declared by an officer of a belligerent power, and when so declared, it will affect the subjects of neutral nations as far as the officer is authorized in his proceeding by his government. The implied authority in this respect vested in a naval commander, is much greater at a distance from his government than when he is near it. To affect neutral nations it must be laid by competent authority.⁽⁴⁾

Neutral nations are not affected by a blockade until they have notice of it. This notice may be publicly given by the belligerent to the neutral government, when it will, in general, be presumed to be given to the subjects of the neutral government; or it may be given directly to the captain or owners of a vessel.

(a) Letter of Chief Justice Marshall, while Secretary of State, of September, 20, 1800, to Mr. King, then American Minister at London. 3 Wheat. App. p. 4. (b) *The Betsey*, 1 Rob. 93; *Williams v. Smith*, 2 Caines, 1; *Radcliff v. Unit. Ins. Co.* 7 Johns. 38; *The Henrick and Maria*, 1 Rob. 146; *The Frederick Molke*, 1 Rob. 86; *The Mercurius*, 1 Rob. 83, *Journal of Congress*, vol. 7. p. 241. Dec. 4th. 1781.

It must appear, either that the neutral subject has had notice of the blockade, or that it was so publicly and generally known, that he must be presumed to have a knowledge of it. (1) Those persons who are in the port blockaded are always presumed to have notice of the blockade. (2)

A blockade is *prima facie* presumed to continue till notification is given of its being raised. (3)

If a blockading squadron is driven off by superior force, a new notification will be requisite, if the blockade is resumed. (4)

If the assured have actual or constructive notice of a blockade declared upon sufficient authority, and maintained by an adequate force, an attempt on his part to carry property warranted neutral, to or from the blockaded port, is a violation of the blockade and a breach of the warranty.

It is a violation of a blockade, to sail from the blockaded port, as well as to enter it. (5) But a neutral vessel that had entered the port before the blockade, may come out in ballast, (6) or with a cargo taken on board before the blockade began, (a) but not with one taken on board after notice of the blockade. (b) So a ship may bring away from a blockaded port the cargo imported in her before the declaration of blockade and still remaining on board. But a vessel purchased at the blockaded port after the declaration of blockade, cannot be cleared out from the port while the blockade continues. (c)

In regard to the acts that amount to a violation of a blockade, Sir William Scott says, 'If a vessel sail for a blockaded port, after having received notification of the blockade, the act of sailing is to be considered as a breach of the blockade.' (d) But Chief Justice Marshall, giving the opinion of the court, (e) intimates that the act of sailing for the blockaded port, knowing it to be such, must be coupled with the *intention* of entering it, in order to constitute a violation of the blockade; for a vessel might sail from the United States for a blockaded port in Europe, after notice of the blockade, with the expectation of its being raised before her arrival, and with the intention of sailing for another port if the blockade should not be raised. Sir William Scott has given a similar opinion. (f)

To constitute a violation of blockade, it is requisite, not only that the party should have the intention, but also that he should do some act in pursuance of such intention. (g) 'The law of nations does not admit of the condemnation of a neutral vessel for the intention to enter a blockaded port unconnected with any fact. Lingering about the place, as if watching for an opportunity to sail into it, or the single circumstance of not making

(1) *The Henrick and Maria*, 1 Rob. 146; *Radcliff v. United Ins. Co.* 7 Johns. 46; 9 Johns. 281; *The Neptunus*, 2 Rob. 110; *The Adelaide*, 2 Rob. 111. n.; *The Calypso*, 2 Rob. 298; *The Mercurius*, 1 Rob. 80; *The Rolla*, 6 Rob. 364.

Neutral property may be brought away from a blockaded port.

(2) *The Vrouw Judith*, 1 Rob. 150.

What acts amount to a violation of a blockade.

(3) *The Neptunus*, 1 Rob. 170.

(4) *The Hoffnung*, 6 Rob. 112.

(5) *Bynk, Q. J. P. i. l. c. 4 & 11*; *The Welvaart Van Pillaw*, 2 Rob. 128. Resolution of the States General of Holland, 1630. 3

Rob. 326. n. (6) *The Frederick Molke*, 1 Rob. 88.

(7) *The Frederick Molke*, 1 Rob. 88.

(a) *Oldden v. M'Chesney*, 5 Serg. & Rawle, 71; *Olivera v. Un. Ins. Co.* 3 Wheat. 183; *The Vrouw Judith*, 1 Rob. 152; *The Juno*, 2 Rob. 118; *The Potsdam*, 4 Rob. 89. (b) *The Neptunus*, 1 Rob. 172; *The Rolla*, 6 Rob. 371; *The Comet*, 1 Edw. 32. (c) *The General Hamilton*, 6 Rob. 61; *The Vigilantia*, 6 Rob. 124. (d) *The Vrow Johanna*, 2 Rob. 109. (e) 4 Cranch, 199. (f) *The Betsey*, 1 Rob. 334; *The Shepherdess*, 5 Rob. 263. (g) *Calhoun v. Ins. Co. of Penn.* 1 Bin. 293.

(1) *Fitzsimmons v. Newport Ins. Co.*, 4 Cranch, 199.

The captain informed from a fleet that a blockade is raised.

(2) *The Neptunus*, 2 Rob. 110.

(3) *The Courier*, 1 Edw. 249.

(4) *The Jufrow Maria Schroeder*, 3 Rob. 147; *The Henricus*, 3 Rob. 159.

n.; *The Vrow Barbara*, 3 Rob. 158. n.; *Oldden v.*

McCheaney, 5 Serg. & Rawle, 71.

Permission to enter.

A ship in distress may enter a blockaded port, or if it have a license.

A ship going to the port to inquire whether the blockade is raised.

Goods may be transported inland from or to the blockaded port.

(5) *The Fortuna*, 5 Rob. 27; *The Charlotta*, 1 Edw. 252; *The Hurtige Hane*, 2 Rob. 124.

immediately for some other port, or possibly obstinate and determined declaration of a resolution to break the blockade, might be evidence of an attempt, after warning, to enter a blockaded port.⁽¹⁾

A vessel sailed from Dantzic for Havre after public notice of its being blockaded by the English, but the captain was informed from an English fleet, which he met with during the voyage, that Havre was not blockaded. Sir William Scott held that if the vessel had been taken before meeting with the fleet, she would have been taken in *delicto*, and liable to confiscation, but the information received from the officers of the fleet being such as the captain was authorized to rely upon, a state of innocence commenced from that time, and he was justified in proceeding for Havre, although the place was in fact under blockade, according to the public notification, of which the captain was presumed to have had knowledge at the time of sailing.⁽²⁾ But it was held in another case that a neutral ship was not authorized to proceed to a port interdicted by a belligerent government, by the permission of an officer of a cruiser of the belligerent, who gives the permission under an erroneous construction of such interdiction.⁽³⁾

It is held not to be a violation of blockade to enter or depart from a port, with the permission of the officers of the blockading squadron, and the vessel entering with such permission may clear out from the port with a cargo.⁽⁴⁾

It is not a breach of blockade to enter the blockaded port from necessity in distress, when no other port can be made; but the necessity must be clearly made out.⁽⁵⁾ So a ship may visit a blockaded port by the license of the government to which the blockading squadron belongs, and such license is construed liberally in favour of the neutral.^(a)

It has been held to be a violation of blockade in the owner of a ship sailing from Dronheim for Amsterdam, then blockaded, to instruct the captain to proceed to the mouth of the harbour, for the purpose of inquiring whether the blockade was raised. He should have ordered the captain to inquire elsewhere. And the court intimates that sailing from the United States for a European port, known to be blockaded, with similar instructions, would be a breach of the blockade.^(b)

It is not a violation of blockade in a neutral to purchase goods at the blockaded port, and transport them inland to another port not blockaded, and export them thence;^(c) or to transport goods by inland navigation to the blockaded port.^(d)

An agreement by charterparty to sail to a port, which is afterwards blockaded, does not justify the captain's proceeding on the voyage, after notification of the blockade.^(e) And Sir William Scott held it to be a breach of blockade in a captain not to

(a) *The Juno*, 2 Rob. 116; *The Hoffnung*, 2 Rob. 162. (b) *The Spes & The Irene*, 5 Rob. 76; *The Posten*, 1 Rob. 335. n. (c) *The Ocean*, 3 Rob. 297. (d) *The Stert*, 4 Rob. 65; *The Jonge Pieter*, 4 Rob. 79. (e) *The Tutela*, 6 Rob. 177.

change his course for a different port, after being warned that the port of destination was blockaded.⁽¹⁾ But it appears from the decisions of the same judge cited above, that the construction to be put upon this act of the captain ought to depend on his distance from the port of destination when he receives the notification, and other circumstances showing whether he continues on his course with the purpose of violating the blockade, or with the expectation of its being raised, and the intention of waiting at some other port for that event.

(1) *The Adonis*, 5 Rob. 256; *The Shepherden*, 5 Rob. 262; *The Apollo*, 5 Rob. 286.

On a question respecting a breach of the blockade of Amsterdam during the time of its being blockaded by the English, in 1798, judgments were given upon the same facts by four different courts. The *Columbia* sailed from New York for Amsterdam without any knowledge of the blockade. The master put into Cruxhaven, which is one or two days sail from Amsterdam, where he heard of the blockade, and he was instructed by the consignees of the cargo at Hamburg 'to proceed to Amsterdam, if the wind should be such as to keep the English at a distance.' It was however understood at Cruxhaven 'to be the practice of British cruisers to stop vessels bound to Amsterdam and send them back without seizing them, and only to seize in case of a second attempt to enter.' The captain accordingly sailed for Amsterdam, with the expectation of only being ordered back if he should meet with any British public armed ships; but his vessel was seized. The eighteenth article of the treaty of 1794, was insisted upon in justification of the captain's conduct; which article provided, 'that a vessel, sailing for a port, not knowing the same to be blockaded, may be turned away, but shall not be detained nor her cargo confiscated, unless, after notice, she shall again attempt to enter.' Sir William Scott said, 'The design was to seize the opportunity of entering whilst the winds kept the blockading squadron at a distance. Under these circumstances, I have no hesitation in saying that the blockade was broken. But it has been said by the American treaty *there must be a previous warning*; certainly, where vessels sail without a knowledge of the blockade, a notice is necessary, but if you can affect them with a knowledge of that fact, a warning then becomes an idle ceremony, of no use and therefore not to be required.'^(a) He accordingly condemned the vessel and cargo; and his judgment was confirmed on appeal.⁽²⁾

(2) *The Columbia*, 1 Rob. 154.

An action was commenced in New York upon a policy, by which the cargo of the *Columbia* was insured and warranted American. Justices Radcliff, Kent, and Benson concurred in the opinion of Sir William Scott, and thought the warranty had not been complied with, and the judgment of the court was in conformity to their opinion. Chief Justice Lansing dissented, upon the grounds that 'the blockade constituted one of those risks intended to be insured against by the policy, being an event calculated to defeat the voyage, occurring after its com-

(a) The Supreme Court of the United States put the same construction upon this treaty. 4 Cranch, 200.

(1) *Vos v. Unit. Ins. Co.*
2 Johns. Cas. 180.

(2) 1 *Caines' Cas. vii. 2*
Johns. Cas. 469. See also *Liotard v. Graves*, 3 *Caines*, 226.

(3) *Williams v. Smith*, 2 *Caines*, 1.

(4) *Maryl. Ins. Co. v. Woods*, 6 *Cranch*, 45.

mentement;' and that by the eighteenth article of the treaty, a vessel that sailed from the United States without a knowledge of the blockade of the port of destination, was entitled knowingly to make one attempt to enter the port, and could only be seized for making a subsequent attempt.(1) The judgment given by this court was reversed by the court of errors, on the ground that the captain, as the judges of that court interpreted the evidence, sailed for Amsterdam, not with the intention of violating the blockade, but for the purpose of entering, if the blockade should be raised before his arrival. The court said, 'The rule adopted by the admiralty sentence was opposed to essential principles, uncertain in its application, and highly vexatious to neutrals.'(2) The judgment of this court seemed to proceed in some measure upon a different view of the facts; but no reasons are given which seem to shake the opinion pronounced by the other courts.

The captain of a vessel bound to Algiers, with liberty to touch at Cadiz, had notice, at sea, several days sail from Cadiz, of the blockade of that place. He however proceeded on the voyage, and not meeting with any blockading squadron off Cadiz he entered that port. It appeared that there was a 'partial blockade' of the place at the time, or a blockade which was not very regularly and strictly maintained. In a policy upon the cargo the vessel was warranted neutral, and it was held that the warranty had not been broken by any violation of a blockade. Mr. Justice Kent, giving the opinion of the court, said, 'The captain is not bound to inquire or wait for events, and see whether the blockade, that once existed, is finally raised; or whether the blockading squadron still retains the *animus revertendi*. The neutral has no means of knowing when a blockade exists in contemplation of law, as contradistinguished from a blockade in fact, and to impose that knowledge upon him at his peril, would be most unreasonable. The only practicable rule is, that there must be an actually existing blockade, to render it unlawful for the neutral to enter. The notice that the captain received at sea several leagues from the port, and some days before the entry, amounted to nothing, if in fact there was no blockade of Cadiz when he arrived there.'(3)

The British government had given its cruisers orders 'not to capture vessels bound to blockaded ports, unless they should have been previously warned not to enter them,' which orders were sent to the courts of admiralty, and published by the government of the United States. It was held that 'while these orders continued in force,' a neutral vessel might lawfully sail for a blockaded port, knowing it to be blockaded; and being found sailing towards such port, would not constitute an attempt to break the blockade until she should be warned off.' But Chief Justice Marshall says, 'It seems a reasonable duty, in ordinary cases, to make inquiry in the neighbourhood, if information be attainable, respecting the continuance of a blockade known previously to exist.'(4) Although the judges in some instances lean to the side of the neutral, and in others to that of the bel-

ligerent, yet all the preceding cases concur in the proposition, that to constitute a breach of blockade, there must be an intention to break it, and some act done towards putting the intention into execution. But in respect to the acts of a neutral which are to be considered a proof of his intention to violate a blockade, and a sufficient execution of the purpose to constitute a breach of the blockade, there appears to be, as might naturally be expected, some diversity of opinion.

Lingering near a blockaded port, as well as continuing on the course towards it, after notification, where it shows an intention to enter the port, is a breach of the blockade.(1)

In giving the opinion of the court in New York on a warranty of American property, Judge Benson intimated that 'it was the duty of the assured to defend the goods against condemnation in the court of the captor.'(2) But he does not say that neglecting to do this will be a forfeiture of the warranty. In a subsequent case on a similar warranty, Judge Yates, in giving the opinion of the same court, said, 'The assured is not obliged to put in a claim; nor can the clause warranting the cargo to be neutral property, create this duty.'(3) But some stress was laid upon the circumstance that the captain, by whom the claim must have been made, was, in consequence of an abandonment, the agent of the insurers and not of the assured. But supposing the captain to be the agent of the assured at the time of his neglecting to claim in such case, still the court seems to be of opinion that his neglecting to make the claim would not affect the warranty, but would receive the same construction as if there had been no warranty; the assured would lose his right of demanding indemnity from the insurers for any loss occasioned by his own negligence or that of his agent.

Lingering near a blockaded port.

(1) *The Elizabeth*, 1 Edw. 198; *The Arthur*, 1 Edw. 202.

Neglecting to claim property warranted neutral, in case of capture.

(2) *Vandenheuvel v. Unit. Ins. Co.* 2 Johns. Cas. 158.

(3) *Gardere v. Col. Ins. Co.* 7 Johns. 520.

Section 9. Particular Warranties and Conditions.

A number of cases have arisen on the construction of policies on 'all lawful goods,' the question being whether this is a warranty that the goods are not contraband of war.

In a case on this subject, a policy was made 'upon all kinds of lawful goods on board the brig *Hannah*, from New York to Havana.' The cargo consisted, among other things, of Russia duck, cordage, ratlines and twine, which were condemned in a British court of vice-admiralty as contraband. Upon this case, Mr. Justice Kent said, 'I am of opinion that the contraband goods were lawful goods, and that whatever is not prohibited to be exported by the positive laws of this country is lawful. The law of nations does not declare the trade in contraband goods to be unlawful. It only authorizes the seizure of the contraband articles by the belligerent powers. A neutral nation has nothing to do with the war, and is under no obligation to abandon or abridge its trade, and yet the powers at war have a right to seize and confiscate the contraband goods, and this they may do

Lawful goods.

(1) V. Supr. 120.

(2) Skidmore v. Desdoity, 2 Johns. Cas. 77; Richardson v. Maine F. & M. Ins. Co. 6 Mass. Rep. 102.

Warranty that the ship shall have no contraband goods on board.

(3) Vandervoort v. Smith, 2 Caines, 155.

Warranty that the ship was well on a certain day.

(4) Blackhurst v. Cockell, 3 T. R. 360.

If the ship shall be condemned upon a regular survey, as unsound, the insurers not to be liable.

(5) Haff v. Mar. Ins. Co. 8 Johns. 163.

(6) Watson v. Ins. Co. of N. A. Condy's Marsh. 159. n. Wharton's Dig. p. 326. n. 82.

from the principle of self-defence. The right of the hostile power to seize, does not destroy the right of the neutral to transport. These are rights which may at times reciprocally clash and injure each other.(1) But this collision is the effect of inevitable necessity. The trade of a neutral in articles contraband of war, is therefore a lawful trade, though a trade from necessity subject to inconvenience and loss.(a) The same opinion has been given in other cases.(2)

Describing the goods in the policy as 'lawful,' or warranting them to be so, has, therefore, according to this opinion, no effect whatever; for if the exportation of the goods were prohibited by the positive laws of the country, the policy would be void, though it contained no provision in this particular.

A policy being made in 1801, on goods from New York to Brazil, with a warranty 'that the vessel should have no contraband goods on board,' the warranty was 'understood to relate to goods *contraband of war*, and not as against the laws of Portugal, for it was well understood between the parties that the voyage insured was a forced and illicit trade, contrary to such laws.'(3)

A ship was insured lost or not lost, 'warranted well on the 9th of December, 1784,' on which day the policy was subscribed between one and three o'clock, P. M. and the ship had been lost about eight o'clock, A. M. on the same day. The warranty was held to have been complied with. Lord Kenyon said, 'We are all of opinion that if the ship were well at any time of that day, it is sufficient.'(4)

Where it was stipulated that 'if the vessel upon a regular survey should be declared unseaworthy, by reason of being unsound or rotten, the insurers should not be bound to pay their subscriptions;' and after a performance of part of the voyage, the vessel was surveyed, and the survey stated that the vessel was not sufficient for the intended voyage, for rottenness *and other causes*, and was not worth repairing, it was held that the assured should recover, because the unseaworthiness was not stated in the survey to arise *solely* from the circumstance of the vessel's being rotten and unsound.(5)

Mr. Justice Washington was of opinion that the assured might recover a loss notwithstanding this clause, where the survey stated that 'many of the timbers were unsound and rotten, and that in the shattered and strained situation of the vessel, and from want of proper docks, the repairs would cost more than the vessel was worth;' for the report of the surveyors did not recommend a sale *solely* on account of the vessel's being rotten, but because some of her timbers were so, and also for other reasons.(6)

(a) Seton v. Low, 1 Johns. Cas. 1. In consequence of the decision in this case, a clause was added to the New York policies warranting the property 'free from charge, damage or loss, which might arise in consequence of seizure or detention on account of illicit or prohibited trade, or trade in articles contraband of war.' 1 Johns. Cas. 15. n.

To discharge the insurers under this clause, Chief Justice Tilghman says, 'the unsoundness or rottenness must be the sole cause of condemnation.'⁽¹⁾ Accordingly, in a case of the condemnation of the ship, upon a report of surveyors that the principal parts of the vessel, enumerating them, were decayed, there being no other reason assigned for condemning her, the insurers were held to be discharged under this condition.⁽²⁾

It being stated in the report of the surveyors that the ship was 'in a leaky state, and in a very decayed condition,' Johnson J. giving the opinion of the court, said, 'If the vessel be declared unseaworthy for any additional cause, besides being unsound or rotten, the defeasance will not avail the insurers. Here, *decay* is exhibited, exclusively, as the mortal disease; every thing else is either inducement or consequence. The springing a leak was a consequence of the decay.' And the insurers were held to be discharged under this condition.⁽³⁾

In respect to what constitutes a *regular survey*, the court considered one to be such for two reasons, because it was procured by the agents of the assured, who was answerable for the irregularity, if any; and also because it was made under the order of the court having jurisdiction of the proceeding.⁽⁴⁾

Where the assured stipulated in case of capture 'to claim the property as Spanish,' the vessel was captured by the English and the property condemned in Bermuda, no claim being made for it as Spanish. The assured alleged, as a reason for his being discharged from this stipulation, that it was void, as involving moral turpitude and false swearing, the property being in fact American, and understood to be so by the parties. Chief Justice Parker gave the opinion of the court that this stipulation was an essential part of the contract, and if it was illegal, the whole contract was void; but that it was not necessarily illegal, for it did not appear that the property might not be claimed as Spanish without false swearing.⁽⁵⁾

An insurance was made on goods from the United States to Havana, and it was stipulated as follows; 'in case of capture the assured agree to claim as Spanish property and prosecute the same until condemnation in the High Court of Admiralty, or acquittal, and the assurers agree to contribute to the expenses thereof according to their respective interests.' The vessel put into Bermuda in distress, where she was seized, and the property insured was condemned. The assured made no appeal from the decision of the Bermuda court to the High Court of Admiralty, in excuse of which they said the underwriters were to advance the funds for prosecuting the appeal, which they refused to do. The court said, 'there was no doubt on the construction of the agreement. The underwriters were to contribute to the expense, but the expense was first to be incurred, or at least the foundation of it laid by an actual claim.'⁽⁶⁾

A policy was made on a vessel and cargo in Boston, on the 31st of January, 1810, with an agreement in the policy that 'should this vessel and cargo be insured in England, this policy is to be cancelled, on the assured's producing a copy of the

(1) *Amroyd v. Union Ins. Co.* 2 Bin. 394. See also *Mar. Ins. Co. of Alex. v. Wilson*, 3 Cranch, 187. (2) *Steinmetz v. U. S. Ins. Co.* 2 Serg. & Rawle, 293.

(3) *Dorr v. Pacif. Ins. Co.* 7 Wheat. 581.

What is a regular survey.

(4) *Dorr v. Pacif. Ins. Co.* 7 Wheat. 581.

The assured to claim the property as Spanish.

(5) *Coolidge v. Blake*, 15 Mass. Rep. 429.

The assured to claim as Spanish property and to prosecute the claim by appeal.

(6) *Thatcher v. Bellows*, 13 Mass. Rep. 111.

The policy to be cancelled if the property should be insured in England.

(1) *Davis v. Boardman*, 12 Mass. Rep. 80.

Orders to be given that the captain shall not cruise.

(2) *Ogden v. Ash*, Dal. 162.

(3) *Bulkley v. Derby Fishing Co.* 1 Connect. Rep. 571.

On goods from the lading thereof on board.

(4) *Spitta v. Woodman*, 2 Taunt. 416; S. C. 16 East, 186. n.; *Nonnen v. Reid*, and same v. *Kettlewell*, 16 East, 176.

Certificate of the minister and church wardens.

policy or the original.' The vessel only was insured in England, and the assured contended that the policy made in Boston was in full force, as he had not produced a copy of that made in England. Mr. Justice Jackson, giving the opinion of the court, said, 'We are entirely satisfied that the insurance, so far as respects the ship, is annulled by the memorandum and the events which have occurred, and the insurance on the cargo is effectual, and the contract in that respect in full force,' on the ground that the intention of the parties, apparent on the instrument, was to cover what might not be insured in England.(1)

The assured stipulated that 'orders should be given that the ship should not cruise.' Though the general intention of the owners, collected from their instructions to the captain, was sufficiently clear that they did not mean to give him liberty to cruise, yet because they had neglected to give him 'positive orders not to cruise,' the policy was held to be void for non-compliance with the stipulation.(2)

During the war of 1812, between the United States and England, there were some instances of warranties that the ship should be furnished with documents from the enemy. It was held in Connecticut that a warranty that 'the ship should be furnished with a passport in the usual form from admiral Sawyer,' who was at the time the commander of the naval force of the enemy on the coast, was not complied with unless the license 'purported to be a protection of the vessel and cargo for the voyage.' But a majority of the court were of opinion that where the cargo consisted principally of flour, but there was some beef, pork and candles on board, a license for 'flour and other dry provisions' would be a fulfilment of this warranty, provided it was the only form of license from admiral Sawyer, and understood by merchants to be the only one required. Two of the judges, out of eight, were of opinion, that the warranty was not complied with, because a part of the cargo, consisting of wet provisions, was unprotected by the license.(3)

In some cases courts have appeared to construe an insurance upon goods 'from the lading thereof on board the vessel,' at a certain place, to be a warranty or condition that the goods shall be loaded on board at the place named. When speaking of this provision of the policy as having the character of a particular stipulation or warranty, and not of a mere fact from which to date the commencement of the risk, courts seem to have considered the object of it to be the ascertaining the state of the goods, so as to secure the underwriter from liability for previous losses.(4) But this clause has most frequently been considered as merely a part of the description of the risk.

Where the printed proposals of the insurance office at which a policy against fire was underwritten, made it a condition on which the payment of all losses should depend, that the assured should produce a certificate of the minister and church wardens of the parish, relating to his character and circumstances, and of their belief that he had really, and by misfortune, sustained the

loss for which indemnity was claimed; it was held that such a certificate must be produced in order to entitle the assured to recover, and that no equivalent proof would answer. There was, however, some diversity of opinion among the different judges on this subject. Where it appeared that the minister and church wardens wrongfully and unjustly withheld the certificate, Eyre Chief Justice, and Buller and Rook Justices, thought that the production of the certificate could not be insisted upon. They said that the policy, being a commercial contract, was to be construed liberally, and the question was, whether the loss had been fairly incurred; if it had, the refusal of the minister and church wardens was without good cause, and therefore the assured were entitled to recover.⁽¹⁾ But a different opinion was entertained by the court of King's Bench. Lord Kenyon said, 'It seems to me that it was the intention of the parties that the certificate should precede payment. If there be a condition precedent to do an impossible thing, the obligation becomes single; but however improbable the thing may be, it must be complied with, or the right which was to attach on its being performed, does not exist.'⁽²⁾

(1) Wood v. Worsley, 2 H. B. 574.

(2) Worsley v. Wood, 6 T. R. 710.

CHAPTER X.

WHAT RISKS MAY BE INSURED AGAINST.

THE risks in insurance are the causes of loss against which the policy is intended to indemnify the assured. It has already appeared that, in general, persons may be insured against any event, by the happening of which they might sustain a pecuniary damage. But there are some exceptions to this rule, which depend upon the same principles that have been stated respecting insurable interest. A contract of indemnity against any risk is void, if incurring the risk, or permitting indemnity against it, be in contravention of the provisions or obvious policy of the laws, or an infringement upon the rights of persons not parties to the contract. A person cannot be insured against the loss which he may incur by violating the law. 'It is an illegal insurance to insure against the consequences of wrongful acts.'⁽³⁾

Illegal risks.

But a person may be insured against the consequences of violating the regulations of trade and the municipal laws of a foreign state.⁽⁴⁾ If the vessel or cargo be seized and condemned in a foreign country, for violating their revenue laws, the insurers will be liable to pay this loss, provided it appears by the policy,

(3) Anon. 5 Taunt. 606.

Violation of foreign trade laws.

(4) Supr. 37.

The assured may be protected against the foreign administration of the law of nations.

(1) Valin t. 2. p. 130, the court says, that to trade in foreign countries in violation of their laws, is regarded as an ingenious and laudable species of address.

One cannot be insured against the consequences of his own misconduct.

(2) *Goix v. Knox*, 1 Johns. Cas. 340.

(3) *Earl v. Shaw*, 1 Johns. Cas. 317. See Poth. n. 65.

(4) *Simeon v. Bazett*, 2 M. & S. 94.

(5) *Anon. v. Taunt*, 605.

and the course of trade, that this was one of the risks contemplated by the parties.⁽¹⁾

A valid contract may also be made for the purpose of indemnifying the assured against the administration of the laws of nations by a foreign tribunal. It has at times been a common practice, in some parts of the United States, to insert a provision in a policy containing a warranty of neutral property, that proof of the property's being neutral should be 'made only in the United States.' The construction put upon this provision was, that the parties to the policy should not be affected by any judgment given by a foreign tribunal respecting the neutral character of the property, but the question should still be left open to be considered by the courts of the United States. The assured was by this agreement protected against a judgment of a foreign tribunal, which should be considered erroneous by the American tribunals. And no question has ever been made as to the legality and validity of such an agreement, but, on the contrary, it has been expressly sanctioned and acted upon in many cases, by the same courts which held that, without such an agreement, the judgment of the foreign court would be conclusive.

A person cannot protect himself by insurance against the loss occasioned by his own fraudulent acts and misconduct. A policy being made against 'all risks,' the court said it applied 'to all losses, except such as arise from the fraud of the assured. This limitation is necessary and proper, for it cannot be supposed that the plaintiff was to be insured against his own fraudulent acts.'⁽²⁾ 'If the assured is guilty of fraud or culpable neglect, his conduct ought not to affect the insurer, and the loss in consequence will be his own.'⁽³⁾ Lord Ellenborough said, in one case that an insurance even against the assured's own acts might be good, if the underwriter was disposed to enter into so hazardous a risk.⁽⁴⁾ But this proposition ought certainly to be limited to the mistakes, or at most to the negligence of the assured; since an agreement by one party to indemnify another against losses voluntarily incurred, seems to be so obviously opposed to the general interest of a community, that it could hardly be enforced by any legal tribunal. And there is the same objection, in a smaller degree, against sustaining a contract to indemnify a man against the consequences of his own negligence. By such an agreement one man would consent to put himself wholly in the power of another, and it could operate only to the injury of the parties, and of the community of which they were members.

It was made a question whether the members of a mutual insurance company could bind themselves to indemnify each other for the loss that any one might incur by his own vessel's running down another. The court said, the assured are also 'insurers, and are as much interested to extend the principle of loss as to restrain it';⁽⁵⁾ and the insurance against this risk was accordingly held to be valid. But the court intimates by giving this reason, that if the contract necessarily made it for the interest of the assured to incur damage, it would for this cause be void.

Upon the principle that a man cannot effectually contract to be indemnified against the consequences of his own misconduct, or the losses and damage which he may voluntarily incur, it has been doubted whether he may be indemnified against the acts of the government of which he is a subject. This question was first raised in a case where both contracting parties were subjects of the same government. A vessel insured, was seized by government and converted into a fire-ship. Chief Justice Holt was inclined to the opinion that the insurers were liable, but the case being referred, the point was not decided.⁽¹⁾

Lord Ellenborough said, that where the assured was a British subject, he might recover against a British underwriter for a loss sustained by an act of their own government; 'that being totally different from the case of a foreign assured; for amongst our own subjects, whether the plaintiff or defendant sustain the loss, it cannot prejudice the interests of the country.'⁽²⁾ The same principle is adopted in the United States.⁽³⁾

In the case of a policy on an American ship from New York to Wilmington, N. Carolina, and thence to Dublin, which sailed on the voyage to Wilmington, but was detained by an embargo before she got to sea from that place; Chief Justice Kent, giving the opinion of the court, said, 'It is a very forced argument to liken this case to a contract to do an unlawful act, or to perform an illegal voyage. The voyage commenced before the law existed. It is not the object of the policy to violate any law. It was an indemnity against arrests and detentions, not a resistance of them. Where both parties belong to the same government, the act of the government is as much the act of one party as of the other, and each ought to be equally estopped from taking advantage of it to the prejudice of the other.'⁽⁴⁾

But it has been held in some cases that a foreign assured is not indemnified under a policy in the common form, against the acts of his own government, although those acts are arrests and restraints, which are expressly included among the risks assumed by the underwriters. Some Americans, being neutrals, shipped property for a voyage from the United States to Liverpool, which was insured in England on account of the shippers. A vessel belonging to the American consul at Liverpool, was insured there at about the same time. After the risks had commenced under these policies, the vessel and cargoes insured, were detained in the American ports by the embargo of 1807. Losses being claimed on this account, Lord Ellenborough, who gave the opinion of the court, said, 'In all questions arising between the subjects of different states, each is a party to the public authoritative acts of his own government; and on that account, a foreign subject is as much incapacitated from making the consequences of an act of his own state, the foundation of a claim against a British subject, in a British court of justice, as he would be if such an act had been done immediately and individually by such foreign subject himself.'⁽⁵⁾

But in a later case the opinion of the same court, given by the same judge, does not confirm this doctrine. A ship and cargo

(1) Anon. 2 Salk. 444; 2 Lord Raym. 840.

(2) Page v. Thompson, Park, 130. n.

(3) Delano v. Bedford Mar. Ins. Co. 10 Mass. Rep. 347; Odlin v. Ins. Co. of Penn. Condry's Marsh. 508. n.

(4) M'Bride v. Mar. Ins. Co. 5 Johns. 299. See also Walden v. Phoen. Ins. Co. 5 Johns. 310; Orden v. New York Firem. Ins. Co. 10 Johns. 177.

(5) Conway v. Davidson, 10 East, 536; same v. Forbes, 10 East, 539; Maury v. Shedden, 10 East, 540.

belonging to Prussian subjects, residing at Colberg, being insured in England, were seized and confiscated by the Prussian government, under the Berlin decree. The insurers in defence against a claim for the loss, assumed the ground upon which the court had decided the above cases. Lord Ellenborough said, 'There is no doubt that an insurance upon an American ship, against an American embargo, might be good; for not only an insurance against the acts of the assured's own government, but even against his own acts, might be good, if the underwriter was disposed to enter into so hazardous a risk.' He goes on to say that the underwriters in the above cases did not intend to insure against the acts of the American government. 'As the perils occasioned by the acts of the party's own government are held to be excluded, on the reason of the thing, so they may be held to be included whenever the reason of the thing requires it.'

(1) *Simeon v. Bazett*, 2 M. & S. 94.

And judgment was given for the assured.(1) But it is not said that there was any difference between the policies, or any other circumstance to distinguish the cases; the latter decision, therefore, seems to overrule the former. Chief Justice Kent says, of this supposition that the act of the government is that of its subjects, that the argument drawn from it is 'too fanciful' to be entitled to any weight.(2)

(2) 5 Johns. 318.

An insurer cannot bind himself to indemnify a foreigner against the hostile acts of the insurer's government.

(3) *Thelluson v. Ferguson*, Doug. 361; *Eden v. Parkinson*, Doug. 732.
(4) *Supr.* 29. & seq.

It has been held that a foreigner cannot be indemnified for the hostile acts of the government of which the insurer is a subject. A different opinion was acted upon in Lord Mansfield's time, as we have seen, for then an alien enemy recovered in some instances of British underwriters for losses by British captures.(3) But such a claim, could not now be enforced, and it was never fully and distinctly recognised to be legal.(4) A neutral assured, however, stands on a different footing, there being no legal objection to his claim, on account of his national character. Accordingly, in a number of instances, the assured under these circumstances have recovered. In some of these cases the property was neutral at the time when the policy was made, but was captured afterwards in consequence of a declaration of war, by the government of the insurers, against the nation to which the assured belonged. One of the cases above cited is of this description. Dutch property was insured in England, and, before the expiration of the risk, was captured by the British, after a declaration of war.(5) In another case, French property was insured in England, and war being declared, the property was captured by the British, and the loss recovered of the British underwriters.(6) These cases have been overruled, and the assured in like circumstances could not now recover; the objection would not merely lie against them personally, as alien enemies, during the continuance of the war, but would go to the substance of the claim; it being now held that a foreigner cannot be indemnified for a loss by a hostile act of the government of which the insurer is a subject.(7) It is so held upon the same principle on which insurance of enemy's property is void, since to allow the insurance to be effectual in such case, would, says Lord Ellenborough, be 'directly and obviously against the in-

(5) *Eden v. Parkinson*, Doug. 732.

(6) *Thelluson v. Ferguson*, *Supr.*
See also *Plantamour v. Staples*, 1. T. R. 611. n.
(7) *Gambia v. Le Messurier*, 4 East, 407.

terest of the state, having an immediate tendency to render ineffectual all offensive operations by sea.'(1)

Thus it was held that British insurers of a vessel that was detained by a British embargo upon all Swedish vessels, were not liable for the loss occasioned by this detention, the embargo being of a hostile character. Lord Alvanley, and the other judges, were of opinion that the insurers could not legally be bound to pay such a loss.(2)

But though the general words of the policy include this risk, or it be particularly insured against, and appears to be one of the special objects of indemnity in the contract, yet it was intimated by Lord Ellenborough that the contract might not, for this cause, be void, but might be valid in regard to the other risks, assumed by the underwriters.(3)

But a neutral may be insured against any act of the government of the insurer, which is not of a hostile nature. An American ship, the *Hannah*, was insured in England, on a voyage from New York to Havre, in the course of which she was arrested by a British cruiser, and carried into Bristol, to ascertain whether she had French property on board; there being a war at the time between England and France. The loss occasioned by this detention was claimed of the underwriters, who objected that they could not bind themselves to indemnify a neutral for losses consequent upon this detention by their own government. Lord Ellenborough said, in giving the opinion of the court, that an 'American was at liberty to pursue his commerce with France, and to be the carrier of goods for French subjects. The indemnity sought in this case, is not an indemnity to an enemy, or to a neutral forfeiting his neutrality by an act hostilely done by him against the interests of Great Britain, but an indemnity to a neutral, as such, against the consequences of an act innocently and allowably done by him in the exercise of his own neutral rights, and as innocently and allowably, to a certain degree, controlled and interrupted on our part, in the exercise of our rights as belligerents.' And on this ground that the detention was not of a hostile character, judgment was given in favour of the assured.(4)

(1) *Kellner v. Le Mesurier*, 4 East, 396. This case is commented upon, 7 East, 451.

(2) *Touteng v. Hubbard*, 3 B. & P. 291.

(3) *Glaser v. Cowie*, 1 M. & S. 52. where *Lubbeck v. Potta*, 7 East, 449, is cited.

An insurer may bind himself to indemnify a foreigner against other than the hostile acts of the insurer's government.

(4) *Barker v. Blakes*, 9 East, 283. See also *Visger v. Prescott*, 5 Esp. 184; *Kellner v. Le Mesurier*, 4 East, 396.

CHAPTER XI.

THE VOYAGE AND PERIOD OF THE RISK.

Section 1. *At what Time or Place the Risk begins.*

SINCE the underwriters are liable only for losses arising from the perils insured against, and within the time for which the risk is to continue; it is requisite that the policy should specify what

The risks must be sufficiently described.

risks the insurers assume, when those risks commence, and for what period they are to continue, or by what event they are to be terminated.

(1) Code de
Com. l. 2. t.
10. n. 152.

Some marine ordinances contain regulations in regard to the time when the risk on the ship or goods shall begin and end.⁽¹⁾ But there is no positive regulation by law on this subject in Great Britain or the United States; nor does it appear that any such is necessary.

(2) Manly v.
Unit. M. & F.
Ins. Co. 9
Mass. Rep.
85.
(3) b. 2. c. 7.
s. 14.

Mr. Justice Sewall says, 'The risk is to be described with suitable and convenient certainty. When the insurance is for a term of time, the *termini* are the day and hour when the insurance commences and terminates. When the insurance is on a particular voyage, there is generally no reference to any time. The *termini* are the places from and to which the vessel is bound. These are to be expressed in the policy, and if left in uncertainty by any omission or blank, and when either appears to have been mistakenly or untruly stated, the policy is void.'⁽²⁾

Molloy says, if a ship be insured 'from London to —,' the risk will not attach for want of a sufficient description.⁽³⁾ But courts do not require a very minute accuracy in the description of the risk; and it is, in general, sufficient if the intention of the parties, in respect to the commencement and ending of the risk, can be satisfactorily gathered from the policy, and any incidental error or inconsistency, in immaterial circumstances, will not defeat the contract.

(4) Manly v.
Unit. M. & F.
Ins. Co. 9
Mass. Rep.
85.

A policy was made on a ship, 'to, at, and from, one or more ports on the globe, for one year, commencing the risk at Barbadoes on the 7th of December, 1810, at 12 o'clock at noon, to continue till the vessel should be arrived and moored at anchor twenty-four hours in safety, within the year aforesaid.' The vessel was not at Barbadoes, as was supposed in the policy, but the court said her being so was immaterial, and that the risk would end with the year without any regard to her being in any port at that time or before; the beginning, duration, and end of the risk, being well enough described, without any regard to the place where it was to commence, or to the vessel's being safe in port, as it appeared by the policy that those facts were not intended to be warranties.⁽⁴⁾

(5) Delongue
v. Firem. Ins.
Co. 10 Johns.
126.

In a policy upon a vessel, the risk was described to be 'at and from her *port* of lading in the province of Yucatan.' The vessel was loaded in an open roadstead at Angostura, which has no harbour, or *port*, in the strict sense of the term, nor, as it seems, is there a harbour belonging to any other place in the province of Yucatan. This was held to be a sufficiently accurate description of the risk, at and from Angostura.⁽⁵⁾

(6) Sir Robert
Howard's
Case, 2 Salk.
625.

If the risk be described to commence *on* a certain day, it extends to all losses happening during any part of the day; but a question has occurred upon the construction of a policy *from* a certain day. The life of Sir Robert Howard was insured by a policy dated on the third of September, 'for one year *from the date*' thereof. He died on the third of September following. Chief Justice Holt instructed the jury that, '*from the day of the date* excludes the day, but *from the date* includes it.'⁽⁶⁾ Whether

the expression, *from the day of the date*, excludes that day, was afterwards very elaborately considered by Lord Mansfield, who examined all the previous authorities on the subject, which he said were 'so many contradictions backwards and forwards.' He came to the same conclusion, which Lord Hardwicke had made, that 'the construction must always depend upon the subject matter.' It was held also that *from the date*, and *from the day of the date*, meant the same thing.⁽¹⁾

(1) *Pugh v. Leeds, Cowp.* 714.

The risk may commence before the policy is subscribed, where it is not known by the parties whether the property is in safety; and to show that the agreement is intended to extend to previous losses, the clause, *lost or not lost*, is introduced into policies. But this clause is not necessary, it is sufficient if it appear by the description of the risk, and the subject of the contract, that the policy is intended to cover previous losses. A wager being made in the terms following; 'I promise to pay the Earl of March 500 guineas if my father dies before Sir W. Codrington;' signed by William Pigot; a corresponding promise being made to Mr. Pigot by the Earl of March; it appeared that Mr. Pigot's father was dead at the time of making the wager. Lord Mansfield said, 'It was not known that the father of either of them was then dead. Their lives, their healths, were neither warranted nor excepted. It was equal to both of them whether one of their fathers should be then sick or dead. That the event had happened was in the contemplation of neither party. The nature of such a contract and the manifest intention of the parties support the verdict of the jury,' who applied the contract to the previous event.⁽²⁾

The risk may extend to a time previous to the date of the policy.

The freight of a vessel being insured 'at and from Demerary, Berbice, and the Windward and Leeward Islands, to London,' the master at Demerary agreed to take a cargo, which was to be discharged at Berbice, and to carry another cargo from Berbice to London. A loss happened before the vessel arrived at Berbice. It was held that the risk had not commenced under the policy. It was said that 'the first voyage from Demerary to Berbice had nothing to do with the voyage insured. The voyage insured was from Demerary, or Berbice, or the Windward, or Leeward Islands, according to the place from which the ship might happen to sail *on her voyage to London*.'⁽³⁾

(2) *Earl of March v. Pigot*, 5 Burr, 2802. See also *Thompson v. Donaldson*, 3 Esp. 63.

At and from Berbice, &c. to London.

Goods being insured 'at and from Gibraltar to Dublin,' were shipped at Malaga, and the vessel did not put into Gibraltar. Chief Justice Gibbs held that the policy did not attach.⁽⁴⁾

(3) *Sellar v. M'Vicar*, 1 N. R. 23.

At and from Gibraltar to Dublin.

A policy was made on goods 'at and from Caermarthen to London.' The goods were in fact taken in at Llanelly, which is a member of the port of Caermarthen, but having a distinct custom-house. Caermarthen lies further up the river, and is accessible only by an intricate navigation, and few ships clear out there, except the coasting vessels belonging to the place. Yet the court decided that the risk run, was different from that described in the policy, one *terminus* of which was Caermarthen.⁽⁵⁾

At and from Caermarthen to London.

(4) *Park v. Hammond*, 1 Holt, 80; S. C. 2 Marsh. Rep. 189; 6 Taunt. 495.

(5) *Payne v. Hutchinson*, 2 Taunt. 405. n

And another case was decided upon the same principle. It was that of a policy on flour 'at and from Lyme to London.' The flour was shipped at Bridport Harbour, which is a member of the port of Lyme, and lies about nine miles eastward of Lyme, and nearer to London, and a vessel bound from Lyme to London must pass Bridport. The court said, if the assured could have proved a usage for ships to load at Bridport, upon a policy at and from Lyme, it might have assisted him, but the whole was probably a mistake, the parties supposing the ship would sail from Lyme. Judgment was given in favour of the underwriters.(1)

(1) *Constable v. Noble*, 2 Taunt. 403.

At and from Calcutta to New York.

A decision has been given in New York upon this point, in a case where the actual risk was strictly a part of that described in the contract. The policy was on ship and freight on a voyage 'at and from Calcutta to New York, with liberty to touch at Madras for trade and to take in a part of the cargo.' The vessel did not go to Calcutta, but took in the whole cargo at Madras. Mr. Justice Thompson, giving the opinion of the court, said, 'It is impossible to say that a voyage from Madras to New York, is the same as a voyage from Calcutta to New York. The adventure is to begin at and from Calcutta. I should not think it competent for the assured to select at pleasure any point of the *iter*, and say the voyage insured shall commence there.'(2)

(2) *Murray v. Col. Ins. Co.*, 4 Johns. 443.

At and from Jamaica.

(3) *Cruikshank v. Janson*, 2 Taunt. 301.

The ship must be in safety at the place where the risk is to begin.

(4) *Bell v. Bell*, 2 Camp. 475.

(5) *Parmenter v. Cousins*, 2 Camp. 235.

The ship is bought by the assured, at the place at which the risk begins.

(6) *Steinback v. Rhineland*, 3 Johns. Cas. 269.

Under a policy at and from a place, a doubt concerning the commencement of the risk sometimes arises from the extent of the place named. A policy at and from Jamaica is held to attach at any port of the island, and to protect the property from port to port in the island.(3)

Under a policy on a ship 'at and from' a foreign port, the risk is held not to commence till the vessel is there in safety. Lord Ellenborough says, 'The safety required to give a good commencement to the risk on the ship is a physical safety from the perils insured against, and not a freedom from political danger.'(4) A policy being made on ship and freight at and from St. Michael's, the vessel arrived there leaky and not fit to take in a cargo, and a storm, which she had met with during the voyage, continuing after she came to anchor, she was driven out to sea again, and wrecked, after having been at anchor more than twenty-four hours. The risk was held not to have commenced.(5)

The risk cannot commence until the assured has an interest. Accordingly in the case of a policy on a vessel 'at and from Trinidad,' which the assured had purchased at that place, the risk commenced at the time of the purchase.(6)

A ship and freight were insured 'at and from Pernambuco, or any other port or ports in the Brazils, to London; beginning the adventure upon the said ship on the termination of her cruise, and preparing for her voyage to London.' The ship having given up cruising went to Pernambuco to procure a cargo, but not being able to procure one there, proceeded to St. Salvador, and a loss happened before her arrival at the latter port. A question was made whether the risk had commenced at Pernam-

buco. Chief Justice Gibbs said, 'The object of the policy must have been to secure the assured from all risks from the time the cruise ended. It has been objected that though the cruise had ended, the ship was not preparing for her voyage. I think that having come to Pernambuco to procure a cargo, and having sent an officer on shore for that purpose, she must be considered as preparing for the voyage within the words of the policy, and that therefore the policy had attached.'⁽¹⁾

Accordingly, where a policy was made on the 3d of September, at New York, on a vessel 'at and from Guadeloupe to St. Thomas's,' and at the time of subscribing, the underwriter was informed that the vessel was at Guadeloupe on the 28th of July, where she had in fact been for a long time before; the court said, that 'in a case like this, the risk does not commence till some act be done towards equipping for the voyage, or on the day on which she is stated, as here, to have been in safety at the port from which she was to sail.'⁽²⁾ But if the ship needs repairs merely, the risk will commence notwithstanding this circumstance.⁽³⁾ But the repairs must be made within reasonable time, and if there is any unnecessary and unreasonable delay, the policy will no doubt be forfeited on the ground of a deviation or enhancement of the risk. So if all preparation for the voyage be suspended, the risk will cease.⁽⁴⁾

Where there are no peculiar circumstances, and a ship is insured at and from a foreign port, it has been decided in one case, of a policy on a ship 'at and from Cape St. François,' that 'the risk commences after she has been safely moored twenty-four hours' at that port.⁽⁵⁾ But Lord Hardwicke was of opinion that in such case the risk commenced immediately on the arrival at the port.⁽⁶⁾ And conformably to this opinion it has been decided in New York, Mr. Justice Kent giving the opinion of the court, that 'at and from, when applied to the ship, includes the period of her stay in the port, from the time of her arrival there.'⁽⁷⁾

In the case last cited, it is decided that, *at and from*, when applied to goods, means from the time the goods are put on board.⁽⁸⁾ But Mr. Justice Heath says, 'the insurance commences when the goods are put on board the boats,' for the purpose of being loaded on board the ship.⁽⁹⁾ It is generally expressed in the English policies, that the risk is to commence on the goods being loaded on board.⁽¹⁰⁾ In French policies which contain no such provision, the risk commences as soon as the goods are put on board of boats, for the purpose of being loaded on board of the ship. Where this is the usual mode of putting the goods on board, it seems to be as properly a part of the risk of the voyage, as any other, and to be included, unless the policy expressly excludes it.

In policies on goods, the risk is often made to commence from the time of loading them on board. The risk would, it seems, commence at this time under a policy 'at and from' the place of shipment. But still a policy in this latter form attaches, in some cases, where one in the former would not. There have been a number of cases of the failure of insurances, in which the com-

(1) *Lambert v. Liddard*, 1 Marsh. Rep. 149; 5 Taunt. 480.

At what time a policy at and from a place, commences upon a ship which has been lying at such place.

(2) *Kemble v. Bowne*, 1 Caines, 75.
(3) *Matteux v. Lond. Ass. Co.* 1 Atk. 545.

(4) *Chitty v. Selwyn*, 2 Atk. 359.

(5) *Garrigues v. Coxe*, 1 Bin. 592.

(6) 1 Atk. 548.

(7) *Patrick v. Ludlow*, 3 Johns. Cas. 10.

Goods insured at and from.

(8) See also *Mellish v. Allnutt*, 2 M. & S. 106.

(9) 2 B. & P. 435.

(10) *Park*, 28.

The risk to commence on goods from the time of loading.

mencement of the risk was to take place from the time of the goods being loaded on board.

A policy was made on goods 'at and from Genoa, from the loading to equip for the voyage;' but the goods had been put on board at Leghorn. The policy was held not to attach in this case, because the event, on which the risk was to commence, had not happened. It was put upon the ground of a representation, as it is expressed in the case, though it appears to have been more properly a warranty, if either, that the goods should be laden on board at Genoa; since in this case the goods being of a perishable kind, it could not be known that they had not previously sustained damage, without examining them, and it was supposed that the state of the goods at Genoa would have been better known, had they been shipped there. The circumstance of their being put on board there, was accordingly considered to be requisite, to bring them within the terms of the policy.(1)

(1) *Hodgson v. Richardson*, 3 Burr. 1477; 1 Bl. 463.

Under another policy on goods 'from the loading thereof on board on the coast of Brazil,' and on the ship in the same manner; and no goods were put on board there, but the ship returned from the coast of Brazil with the same cargo she had carried thither from the Cape of Good Hope; the court decided that the risk never commenced on either ship or cargo.(2)

(2) *Robertson v. French*, 2 East, 130.

A similar case occurred in New York. It related to a policy on goods, 'beginning the adventure from and immediately following the loading thereof at Vera Cruz.' The vessel, not being permitted to discharge there, returned to New Orleans with the same cargo she had carried out. It was the opinion of the court, that the event had not occurred on which the risk was to commence.(3) In this case Mr. Justice Livingston made a distinction between a policy on the ship, and one on the cargo, saying there was a reason why in these circumstances the risk on the cargo should not commence, which did not exist in regard to the ship, for the ship was warranted seaworthy at the commencement of the risk, whereas there was no similar warranty in regard to the cargo; the loading of the goods he therefore thought to be of importance, as their condition at the time would thereby be better known. This distinction was probably suggested by the above case of *Hodgson v. Richardson*, but the case of *Robertson v. French* makes no such distinction, the policy in that case being on both ship and goods, and the risk was held to attach on neither. There seems to be no ground for the distinction, for the assured in a policy on goods must prove the loss to have happened during the risk, and the insurers are not liable for any loss that cannot be proved to have happened after the commencement of the risk, which is equivalent to a warranty against any previous damage or defect.

(3) *Graves v. Mar. Ins. Co.* 2 Caines, 339; *Scriba v. Ins. Co. of N. A.* 1 Condry's Marsh. 247. n.

A number of judgments have been given in conformity with the opinions above cited.(4)

(4) *Richards v. Mar. Ins. Co.* 3 Johns. 307; *Vredenburg v. Gracie* 4 Johns. 444. n.

Where, under such a policy, the goods, though not actually shipped at the port, from the loading at which, the risk was to commence, were yet overhauled so that their condition was satisfactorily ascertained, the court still held that the risk did not

commence.(1) In this case, however, the court thought the loading at the port where the risk was to commence, was a material circumstance, and in effect warranted in the policy, as it would diminish the risk from French capture.

(1) *Spitta v. Woodman*, 2 Taunt. 416; 16 East, 188. n.

In another case, again, in which a similar judgment was given, the opinion depends upon the circumstance that it could not be known whether the goods had been damaged previously to the commencement of the risk.(2) In a subsequent case(3) the policy was upon ship and cargo from Landscrona to Wolgast 'at and from the loading of the goods on board the ship.' The goods were put on board at Gothenburg, which circumstance was stated to the underwriters at the time of subscribing. But if this provision be considered a warranty, a representation could not affect its construction.(4) The goods were overhauled and examined at Landscrona sufficiently to ascertain the duties due upon them, and to know their condition. The same is, however, said to have been done in the above case of *Spitta v. Woodman*, yet in that case the court decided that the risk did not commence, whereas this case was decided in favour of the assured. The circumstance of examining the goods in this case, could have been of but small importance on account of ascertaining their condition, as the insurance was 'free from average.' It could only have affected the amount of the insurable interest, at the commencement of the risk. This circumstance was noticed by the court as distinguishing the case from that of *Spitta v. Woodman*, but after all, it does not seem to distinguish it, for according to the reports of the two cases there appears to have been substantially the same, unloading and reloading of the goods in each. The court says that the period of time from which the responsibility of the underwriters is to commence, as to the goods, is as well fixed by a partial unloading and reloading at Landscrona, as by a more perfect and entire shipment. In both cases, therefore, there was a sufficient unloading and reloading to fix the time of the commencement of the risk.

(2) *Horneyer v. Lushington*, 15 East, 46.
(3) *Nonnen v. Kettlewell*, and *Nonnen v. Reid*, 16 East, 176.
(4) *Supr.* 127.

An insurance was made in New York 'upon all kinds of goods and merchandises laden, or to be laden, on board of the *Rolla*, beginning the adventure from and immediately following the loading thereof on board at *Cagliari*.' On the arrival of the ship at that place, all the cargo then on board, except some logwood, was hoisted upon deck, in order to take in 500 salms of salt, which was the only part of the cargo taken on board there. The cargo brought to *Cagliari* was restowed, and the ship proceeded on the voyage insured, in the course of which she was captured. Mr. Justice Van Ness gave the opinion of the court. He said, 'the plaintiff's right to recover for any other part of the cargo than the salt, depends on the fact whether it was shipped at *Cagliari* or not. The hoisting the cargo out of the hold of the ship and restowing it, does not amount to a loading it on board the ship, either according to the words, the reason, or the spirit of the contract. The policy attached therefore only upon the salt.'(5) But if in this case, the goods had been landed upon

(5) *Murray v. Col. Ins. Co.* 11 Johns. 302.

a wharf and then taken on board again, there seems to be no ground to doubt of this being a *loading*, within the terms of the policy.

In a case upon a policy on goods 'at and from Gothenburg, beginning the adventure on said goods from the loading thereof on board,' a memorandum was added to the policy stating it to be in continuation of five former policies, specifying them. The goods had been put on board in Virginia, and it does not appear that they had been reloaded at Gothenburg, but rather that they had not. Lord Ellenborough, giving the opinion of the court, said, that 'a very strict and certainly a construction not to be favoured, and still less to be extended, was adopted in *Spitta v. Woodman*. If there be any thing to indicate that a prior loading was contemplated by the parties, it will release the case from that strict construction.' And this was considered as being indicated by the memorandum above mentioned, and accordingly it was held that the risk commenced at Gothenburg.⁽¹⁾

(1) *Bell v. Hobson*, 16 East, 240.

This case shows that a loading at the port named is not necessary to fix the time when the risk begins, for the risk is held to have attached, though there was no loading or reloading at such port. What Lord Ellenborough intimated, therefore, in *Nonnen v. Reid*, as to the importance of reloading for the purpose of fixing the commencement of the risk, seems in this last case not to have been strictly adhered to by the court.

But in another case decided in the Common Pleas, upon a policy on goods from the same place, in which the commencement of the risk was described in the same words, the risk was held not to have commenced, as the goods had not been shipped or reloaded at Gothenburg. At the time of making the policy, the underwriters knew that the goods had been loaded at London, but the court said 'they could not make the construction of a written instrument depend on the knowledge which the insurers might happen to possess of the facts.'⁽²⁾

(2) *Langhorn v. Hardy*, 4 Taunt. 623.

A similar decision was again given in the King's Bench upon a policy on goods 'at and from Gothenburg, beginning the adventure from the loading thereof aboard.' They had been loaded at Christiansand, and not reloaded at Gothenburg. Lord Ellenborough, in giving the opinion of the court, said, that the commencement of the risk must be supposed to have been described in this manner, to protect the insurers from liability on account of previous losses, and that construing the words from 'loading the goods on board' to mean the same as 'from the time of their being on board' at the place named, would be giving them no effect, for this would be the construction without any such words. The opinion was that the risk did not commence.⁽³⁾

(3) *Mellish v. Allnutt*, 2 M. & S. 106.

Yet the principle which governed the court in putting this construction upon these words, had been rendered questionable, at least, in a former case, by the opinion of the same judge. It was upon a policy on goods 'at and from Pernambuco to Maranh, and at and from thence to Liverpool, 'beginning the ad-

venture upon the said goods upon the loading thereof on board wheresoever.' The goods were a part of the cargo carried outward to Pernambuco, a loss on which had happened on the voyage from Pernambuco to Maranh. It was decided that the risk commenced at Pernambuco. Lord Ellenborough said, 'It certainly throws some difficulty in the way of this construction that it may probably aid in covering a damage which happened before the commencement of the risk. But when we consider that the assured is bound to prove that the loss happened within the limits of the voyage insured, that difficulty is in a great measure removed.'⁽¹⁾

(1) *Gladstone v. Clay*, 1 M. & S. 418.

From all these cases it is not easy to determine the construction of a policy in which the risk is to commence on the loading of the goods at a port named. If it be considered a warranty that the goods shall be loaded at such port, the courts seem, in some of the above cases, to have departed from the usual construction of express warranties. But if these words are to be considered as merely description, they will not affect the contract, if the policy provides any other way of ascertaining the time when the risk commences. In some of these cases they have been considered to be mere description, since the policy was held to attach, although the goods were not loaded at the place named, and they are probably used merely as description by the parties, in the greater number of instances. If the words constitute a warranty, or a condition, on a compliance with which the commencement of the risk is to depend, the sense must be, that the state of the goods is to be ascertained at the place named, and it would be a compliance with such a condition, in this construction of it, to show in any way what was the state of the goods at such place. This might appear in some instances by the kind of goods, the character of the ship, the length of the previous voyage, and the sort of weather experienced. A merely literal compliance with the words of the condition, by loading the goods on board at the place named, would not ascertain the state of some species of goods, such, for instance, as piece goods in boxes or packages. These words do not, however, seem necessarily to have any relation to the degree of risk, but if they are to be considered as a description of the risk merely, they would, if not complied with, defeat the contract, unless the policy afforded some other means of fixing the time when the risk should attach; but if a particular place is named, the fact that the goods are on board at such place seems sufficiently to fix the commencement of the risk.

The risk cannot commence on freight, or any other subject, until the assured has an interest, and one has no insurable interest in freight until he has done something towards earning it. Accordingly the risk on the freight for a specified voyage, commences at the time when an insurable interest in the freight accrues, and it has already been considered what circumstances will create such an interest.⁽²⁾ Where the interest in freight has accrued previously to the time from which the insurers are to take the risk, the commencement of the risk on this interest

Commencement of the risk on freight.

(2) *Supr.* 51.

is determined by the same principle, upon which it depends in the case of an insurance of the ship or goods.

Commence-
ment of the
risk *from* a
place.

Under a policy *from*, instead of *at and from* a place; the risk attaches at the time of the vessel's sailing, that is, at the time of weighing anchor, and breaking ground for the voyage, with all the preparations completely made.(1)

(1) Poth. h. t.
a. 63; Thel-
lusson v. Fer-
gusson, Doug.
361; same v.
Staples,

Doug. 386. n.;
Audley v.
Duff, 2 B. &
P. 111; Sel-
lar v. M'Vicar,
1 N. R. 23.

(2) Salvin v.
James, 6
East, 571.

(3) Sullivan
v. Mass. Mut.
F. Ins. Co. 2
Mass. Rep.
318.

(4) 35 Geo.
III. c. 63. s.
12.

(5) Cleve-
land v. Un.
Ins. Co. 8
Mass. Rep.
308.

(6) Wood v.
N. E. M. Ins.
Co. 14 Mass.
Rep. 31.

If the risk be
to Jamaica
generally, it
ends at the
port of ar-
rival.

Section 2. Continuance and End of the Risk.

It is provided in some policies that the risk may be continued or renewed indefinitely, by the assured's paying the premium at successive periods,(2) or complying with other specified conditions. Other policies contain a provision that the assured may put an end to the risk at any time at his election.(3)

In Great Britain policies for a certain time cannot be made for a longer period than twelve months.(4) But there is no such limitation in the United States. A policy was made on a vessel 'from Salem to any place or places, backwards and forwards, round the globe one or more times, during her stay at all such places, until her return to the United States,' at a certain premium per month; it being a voyage for seals and oil. It was insisted, on the part of the insurers, that the duration of the risk ought to be limited by the usage of such voyages, otherwise it might continue as long as the vessel should exist as such. The court said they saw no objection to its so continuing.(5) But in general the continuance of the risk is absolutely limited in the policy by some time, or place, or event.

In the case of insurance for a certain time, there can be no doubt in regard to the termination of the risk, when the time of its commencement is once fixed.

The risk may be described to be for a certain time, with a condition for its longer continuance. A vessel was insured for the term of twelve calendar months, with a provision that, 'should the vessel be at sea at the expiration of this period, the risk was to continue until her arrival at a port of discharge.' She was captured, and carried into England, under the pretence that she was bound to an enemy's port, and was detained at Bristol at the expiration of the year, whence, after being released, she pursued her voyage. On the part of the insurers it was objected to the continuance of the risk, that the vessel was not *at sea* at the expiration of the year. Chief Justice Parker, giving the opinion of the court, said, 'A vessel is considered *at sea* within the common meaning of the term, while on the voyage, although during a part of the time she is necessarily within some port.'(6)

Insurance is sometimes made to a place having divers ports; and if under such a policy the voyage is commenced, with the intention of touching at more than one of those ports, the question occurs, whether the risk terminates at the first or some subsequent port. Under a policy on a ship and cargo, 'from Geor-

gia to Jamaica' generally, with a provision that the risk should continue until the ship should be moored twenty-four hours in safety, a part of the cargo was destined to Montego Bay, and the rest to St. Anne's, both in that island. The ship arrived at Montego Bay, and after remaining there in safety nearly a month, and discharging the part of the cargo which was to be delivered there, she sailed for St. Anne's, and was lost on the passage. Lord Kenyon said, 'Where a ship, insured to any particular port of delivery, was forced into a different port, and there discharged a part of her cargo, and afterwards proceeded to her port of delivery, the policy remained good. But where a ship, under a general policy to Jamaica, and until moored twenty-four hours in safety, came to any port, and there voluntarily remained, and discharged part of her cargo, this, in his opinion, put an end to the policy, after remaining there twenty-four hours, whether the policy was on ship or goods.'(1)

A policy 'to two ports on the coast of Brazil,' is an insurance to any two ports on that coast at the election of the assured.(2)

Under a policy on a ship to 'Barbadoes and a market,' the court said, the 'vessel may *bona fide* go from island to island, until her cargo is disposed of; but we do not mean to say that the same construction is to be given to a policy in any other trade than that to the *West Indies*.'(3) But an insurance to any island in the West Indies, some of those islands being hostile, will be limited in construction to those which are friendly.(4)

A ship was insured from New York to Bourdeaux, with a provision that if the ship should be refused admittance or turned away, she might 'proceed to a near open port.' This gave the assured permission, on the vessel's being turned away from Bourdeaux, to substitute another port at which the risk should terminate. In regard to the port that might be substituted in such case, Mr. Justice Spencer, in giving the opinion of the court, said, 'the terms *near open port* must be considered as used in a geographical sense, and not as depending on the facility of reaching a distant port, if the wind should happen to be favourable. They admit of some latitude, but still there must be a limitation. If it be conceded that L'Orient comes within the expression, *near open port*, in reference to Bourdeaux, it is perhaps as great an extension of the import of the words as ought to be allowed. We are of opinion that neither Falmouth, Plymouth, nor Guernsey, can be considered a near open port to Bourdeaux.'(5)

In an insurance 'to the vessel's *port* of discharge in Europe,' the risk continues to the port where the vessel first breaks bulk, for the purpose of discharging. Under such a policy the vessel sailed from Boston to the Maese, but the captain, understanding that the vessel and cargo would be confiscated, if he proceeded to Rotterdam, turned to Gothenburg, to inquire the state of the markets in the Baltic, and after leaving Gothenburg, and while proceeding to a market in the Baltic, the vessel was captured. The court said, 'When property is insured to a port of

(1) Leigh v. Mather, 2 Esp. 412; Park, 64. See also Camden v. Cowley, 1 Bl. 417; Baras v. Lond. Ass. Co. Park, 64.

To two ports of Brazil.

To Barbadoes and a market.

(2) Vandervoort v. Smith, 2 Caines, 155. (3) Maxwell v. Robinson, 1 Johns. 333.

The vessel, if turned away, is permitted to proceed to a near open port.

(4) Neilson v. De La Cour, 2 Esp. 619.

(5) Tenet v. Phœn. Ins. Co. 7 Johns. 363.

To the ship's port of discharge in Europe.

discharge, the assured has a right to obtain advice at his port of arrival respecting the markets, and to proceed to such port as promises the best sales, and is still protected by the policy; not being obliged to discharge his cargo at the first port he makes; in which opinion they were confirmed by that of several eminent underwriters. If the captain had broken bulk, or begun to unload at Gothenburg, that must have been considered the port of discharge. (1)

(1) Coolidge
v. Gray, 8
Mass. Rep.
527.

Where the policy was on ship, cargo, and freight, from the Canaries 'to any port or ports in Spanish America,' the construction adopted was, that the voyage terminated when the cargo was discharged, and that the policy would not cover a new voyage undertaken from one port of Spanish America to another. (2) The court seems to be of opinion that the risk would continue to the last port of discharge.

(2) Stocker v.
Harris, 3
Mass. Rep.
409.

To Bilboa or
a port of dis-
charge.

A vessel being insured 'from Beverly to Bilboa, or port of discharge in Europe, and from Europe to her port of discharge in America, or to a port or ports in India,' proceeded to Bilboa, where a part of the cargo was discharged, and then sailed to Lisbon. It was contended, in behalf of the assured, that a policy to Bilboa, or a port of discharge, was equivalent to one to Bilboa, and a port of discharge. Chief Justice Parker, giving the opinion of the court, said, 'The plain meaning of the expression is, to Bilboa or some other port of discharge. The vessel might have touched at Bilboa, and other ports, and finally have discharged at Lisbon. If this be the true construction of the policy, the legal effect would be the same, as if the voyage had been stated to be to the port of discharge in Europe; omitting *Bilboa* in the description. In such case, breaking bulk at Bilboa for the purpose of discharging, and actually discharging a part of the cargo, would take away the right of going elsewhere on the outward voyage.' It was accordingly held that the risk on the outward voyage ended at Bilboa. (3)

(3) Stephens
v. Bev. Ins.
Co. Mass. S.
J. C. Essex,
Oct. 1820.
To be report-
ed probably,
1 Pickering's
Rep.

To a port of
discharge in
United States.

A ship being insured from the United States to Europe and back 'to her port of discharge in the United States,' cleared out from St. Ubes, with a load of salt, for New York, on arriving at which port, the captain immediately advised his owner at Hartford, of his arrival, and the owner, in reply, without any delay, ordered the captain to proceed with the ship and cargo to Middletown, on Connecticut River. As the vessel could not proceed up the river with her whole cargo, she must be lightened either at New York, or at the mouth of the river. The captain, after consultation, lightened her at New York, by discharging about three thousand bushels of salt into lighters, to be transported to Middletown. The usual entry of ship and cargo was made at New York, as at the port of discharge, and the duties were paid on three boxes of lemons, the only part of the cargo subject to duties. No part of the cargo was landed at New York. Reeve, C. J. 'If the port of discharge may mean a different port from the port of arrival, then to such different port is the vessel insured. And this appears most reasonable; that

the agents of the assured may learn upon arrival at what port they can sell their cargo, and thus sail to the port of discharge, protected by the policy.' Six of the judges were of opinion that the risk continued to Middletown. *Ingersol, J.* 'As it strikes me, the entry at the custom house in New York, and putting a part of the cargo on board of lighters, makes New York the port of discharge.' *Smith, J.* 'The port of discharge not being named in the policy, gave the assured the right of electing one, but when he had once exercised the power, he must be bound by it. This election was made by clearing out for New York. But if there was still any doubt, the fact of entering at the custom house, and paying the duties, ought to be conclusive.'⁽¹⁾ And it was held, in another case, that the landing of 150 boxes of lemons at New York, while the ship was waiting for orders from the owner, the lemons being in a perishing state and likely to be spoiled, does not make New York the port of discharge under such a policy.⁽²⁾ And so it was held in regard to the discharging of the crew in New York, and immediately shipping another to proceed to Middletown, on the owner's giving directions to this effect.⁽³⁾

- (1) *King v. Middletown Ins. Co.* 1 Connect. Rep. 184.
 (2) *Sage v. Middletown Ins. Co.* 1 Connect. Rep. 239.
 (3) *King v. Hartford Ins. Co.* 1 Connect. Rep. 333.

The interest of the captain in a cargo was insured 'from London to all or any of the ports or places in the East Indies, China, or Persia, or elsewhere, on this or the other side of the Cape of Good Hope, until arrived at the last place of discharge in the outward voyage.' The cargo carried under the charter-party was wholly discharged at Calcutta; but the captain, having disposed of a part of his investment at Calcutta, intended to dispose of the rest at Madras, whither the ship was ordered by the company on an intermediate voyage. A loss happened on the voyage to Madras, and a question was made whether the risk ended at Calcutta. Lord Ellenborough told the jury that, under these circumstances, Calcutta was 'the last port of discharge on the outward voyage.'⁽⁴⁾

On goods until arrived at the last port of discharge.

- (4) *Richardson v. Lond. Ass. Co.* 4 Camp. 94.

Insurance being made on a ship 'to any port or ports in the River Plate, until her arrival at the last port of discharge' in the river; the captain intended to put into Buenos Ayres, and discharge his cargo there, but hearing, after he came into the river, that Buenos Ayres was in the hands of the enemy, he put into Monte Video, intending to discharge his cargo there, if the markets were favourable; but at the same time not relinquishing the design of proceeding to Buenos Ayres, to complete the discharging of the cargo, if it should be practicable. While the vessel lay at Monte Video, a loss took place; Buenos Ayres still remaining in the possession of the enemy. The court was of opinion that the risk ended at Monte Video, as the captain did not contemplate going to any other port, except Buenos Ayres, and he could not legally go thither, while the place was in possession of the enemy.⁽⁵⁾

On the ship to her last port of discharge in the River Plate.

- (5) *Brown v. Vigne*, 12 East, 283.

The risk on the ship or cargo may be terminated by the accomplishment of the object of the voyage short of the port of destination. A ship was insured 'from Boston to Tonnigen.'

The risk of the ship ends by a delivery

of the cargo to the consignees at a place short of the port of destination.

- (1) *Shapley v. Tappan*, 9 Mass. Rep. 20.
 (2) *Phillips v. Champion*, 1 Marsh. Rep. 402. 6 Taunt. 3.

The risk ends if the voyage is given up.

- (3) *Blackenhagen v. Lond.* Ass. Co. 1 Camp. 454.
 See also *Richardson v. Maine Ins. Co.* 6 Mass. Rep. 117, 121.
 (4) *Brown v. Vigne*, 12 East, 286.

- (5) *New York Firem. Ins. Co. v. Lawrence*, 14 Johns. 46.
 (6) *Speyer v. New York Ins. Co.* 3 Johns. 94.

The risk ends if the voyage is broken up by a peril not insured against.

On the ship until moored twenty-four hours in safety.

The ship was compelled by stress of weather to enter the Elbe for safety, and she proceeded up to Gluckstadt. The consignee received the cargo there. Mr. Justice Parker gave the opinion of the court, 'that the voyage was completed by the consent of the master and consignee to deliver and receive the cargo at Gluckstadt, this being a substitution of that place for Tonningen. The object of the voyage, as understood by the parties, was to carry the cargo to Tonningen, and it was competent to the parties to put an end to the contract between them, by adopting Gluckstadt as the place of delivery.'(1)

But it has been held that the risk on a ship, insured for a fishing voyage, was not terminated by the arrival of a part of her cargo, which was sent home by another ship.(2)

The risk ends when the voyage is given up. Goods were insured from London to Revel, and the master of the vessel having intelligence, on the voyage, that there was an embargo on English vessels at Revel, put back for England, and a loss took place on the way thither. Lord Ellenborough said, 'If the ship, being unable to enter at Revel, had returned with an intention of ultimately completing the original voyage, a question of some nicety might have arisen. But the original voyage was abandoned, and the underwriters were discharged.'(3) And the same judge said in another case, 'There may be causes for a ship putting back for a time, without any intention of abandoning her voyage; as the approach of an enemy, or a temporary embargo; or as in a case which occurred before Lord Kenyon, where a ship bound to a port in the Baltic, found it blocked up by ice, on which she put back, but afterwards, on a thaw, sailed again.'(4)

In a case of insurance 'to Gothenburg, and one port of discharge in the Baltic,' the captain, while at Gothenburg, elected St. Petersburg as his port of destination, but after sailing, changed his mind, and determined to go to Stockholm, and was captured before altering his course for Stockholm, and while he was on the common course to both those places. The judges of the Supreme Court, in New York, were divided in opinion on this case, but in the Court of Errors, Chancellor Kent gave an opinion, supported by an elaborate argument, and examination of cases, that the master's determination to go to Stockholm put an end to the risk, and, accordingly, that the insurers were not liable for any loss, subsequent to that determination. The other judges concurred in this opinion.(5)

The risk ends when the voyage is intercepted and broken up, by a peril not insured against. Insurance was made 'from New York to Bourdeaux, free from loss or detention, in consequence of prohibited trade.' The vessel was prohibited to enter at Bourdeaux. Chief Justice Kent said, 'The prohibition to enter, under the special provision in the policy, was equivalent to an actual termination of the risk by landing the goods.'(6)

Insurance is frequently made on the ship to a certain port, and 'until she has been there moored twenty-four hours in safety.' Under such a policy, on a voyage to London, the vessel arrived

at the wharf, where she was to unload, and was laid on the outside of the tier, there being no room on the inside. After lying there moored and lashed to other vessels, more than twenty-four hours, she was forced adrift by the ice and lost. Lord Kenyon was of opinion that she had been moored twenty-four hours in safety.(1) But in the case of a vessel, that within twenty-four hours after her arrival, was ordered back to quarantine, it was held that the risk continued during the quarantine, and consequently until she should be moored twenty-four hours in safety, after the expiration of the quarantine.(2)

A brig, insured 'from Norfolk to a port or ports in the island of Jamaica, and until moored twenty-four hours in safety,' arrived at Annato Bay, in that island, and anchored at the usual anchoring place, where vessels commonly load and unload. At the time of her arrival the wind was blowing a fresh gale, with squalls, and it continued to increase until the brig lost both her anchors, and was driven ashore and lost; but she was not lost, nor had she sustained any damage, until more than twenty-four hours after coming to anchor. Chief Justice Parsons, giving the opinion of the court, said, 'if no loss, for which the underwriters are answerable, happen during the voyage, or during the twenty-four hours after, they are discharged. The vessel is safe, within the terms of the policy, until she suffers a loss insured against.'(3)

When a ship is insured to a certain place, without any provision for the continuance of the risk twenty-four hours after she is safely moored, the most obvious construction seems to be, that the risk ends as soon as the ship is safely moored at the port of destination,(4) and this is very distinctly implied in all the cases respecting the continuance of the risk during the first twenty-four hours of her being safely moored. But the risk does not end until the ship can be moored in the usual place. A ship insured to Havana, came to anchor near the Moro Castle, at the entrance of the harbour, where all vessels are obliged to wait until they are visited by the health-officers, and those of the custom-house. It is not, however, considered a place of safety, nor do vessels discharge their cargoes there. After remaining there more than one day, and before the ship had been visited or admitted to entry, she was wrecked. It was held that the risk had not ended.(5)

The risk on the cargo terminates on its being delivered to the consignee.(6) Goods being insured, 'till safely landed,' were put into a public lighter, and the lighterman asked if he should stay to see the goods landed, and the assured replied that he need not, but that he himself would look to the landing of them. The lighter being along-side of the wharf, was sunk during the night with the goods on board. Chief Justice Mansfield said, 'The case depended on the point, whether the assured did not take the cargo into his own care and possession. It seemed to him that he did. He discharged the lighterman, and placed himself in the same situation as if the goods had been actually landed and delivered.' Heath, J. said, 'Every party may re-

(1) *Angerstein v. Bell, Park*, 55.

(2) *Waples v. Eames*, 2 Str. 1243.

The ship is considered in safety though she arrives in a gale.

(3) *Bill v. Mason*, 6 Mass. Rep. 313.

In a policy on a ship to a place generally, the risk ends when the ship is safely moored.

(4) *Ord. of Louis XIV. h. t. a. 5. Code de Com. a. 152*; *Bill v. Mason*, 6 Mass. Rep. 313.

(5) *Dickey v. Unit. Ins. Co.* 11 Johns. 358.

The risk in lighters upon goods insured until safely landed.

(6) *Low v. Davy*, 5 Bin. 595.

(1) *Strong v. Nattally*, 1 N. R. 16.

(2) *Sparrow v. Carruthers*, 2 Str. 1236; *Hurry v. Roy. Ex. Ass. Co.* 2 B. & P. 430, 3 Esp. 289; *Rucker v. Lond. Ass. Co.* 2 B. & P. 432. n.

The risk continues on the goods until they are landed, if they are landed in the usual way.

(3) *Matthie v. Potts*, 3 B. & P. 23.

The risk continues on goods insured to the coast of Labrador, after arrival there.

(4) *Noble v. Kennoway*, Doug. 510.

Goods being insured to the coast of Africa, and until landed, the risk continues on the coast.

(5) *Parkinson v. Collier*, Park, 470.

The risk ends by the landing at the Lazaretto at Leghorn.

nounce so much of a contract as is for his own benefit,' and he thought that in this case the assured, by his own conduct, 'renounced that part of the policy by which the goods were protected till safely landed.'(1) But it is held, that where the policy is on the goods until safely landed, and they are landed by public lighters, the risk continues on board of the lighters.(2)

In the case of a policy on goods from Nassau to Campeachy, 'till discharged and safely landed,' the goods were put on board of launches, for the purpose of being run ashore; it was held that the risk continued on board of the launches, *this being the usual mode of carrying on the trade*.(3)

These cases all proceed upon the principle that the risk continues on the goods insured to any place generally, until they are landed at such place, provided the usual mode of landing them is pursued, and there is no unnecessary delay in this respect, which would amount to a deviation.

But the consignee may terminate the risk, before the time when it would expire in the usual course under the policy, by receiving the goods into his own care. But what act of the assured or consignee will amount to a taking of the goods into his own care, and diverting them from the usual course of the trade, so as to put an end to the risk, depends very much upon the usage of the particular place. In most places there is not the same distinction of public and private lighters as at London, nor is this distinction of any importance, except so far as the employment of one or the other shows that the consignee does, or does not, take the goods into his own keeping, and out of the usual course of the risk.

In the case of a policy on goods to the coast of Labrador, till safely landed, the vessel arrived on that coast the twenty-second day of June, and the crew were employed in fishing, except at short intervals while they were landing such parts of the cargo as were wanted, until the 13th of August, when the vessel, still having the principal part of her cargo on board, was captured by an American privateer. Lord Mansfield, and all the other judges were of opinion, that there was not more delay than the usage of the trade justified. The risk had not expired, because the assured had not had more than the usual and reasonable time, according to the course of the trade, for landing the cargo.(4)

Goods being insured to the coast of Africa, 'till safely landed,' the vessel lay on the coast, from the 6th of May till the 4th of June, waiting for a return cargo to come down from the country, as is customary; and while so waiting was captured by a French privateer. Lord Kenyon was of opinion, that the risk continued to the time of the capture, and refused to admit evidence that, by the usage in these voyages, the risk continued on the goods but twenty-four hours after the vessel was moored.(5)

A question concerning the termination of the risk on goods insured, 'until they should be safely landed at Leghorn,' was decided upon the same principles. It being customary to land goods, of the kind insured, at the Lazaretto, about a half of a

mile from the city, whence they were usually transported to the city in lighters at the risk and expense of the consignees; it was held that this was the landing contemplated in the policy.(1)

Goods being insured, with a provision that the risk should continue 'twenty-four hours after they were landed;' a part of them had been landed more than twenty-four hours, when both the goods landed, and those remaining on board, were seized as illicit, and confiscated. The risk of illicit trade being one of those insured against, the court held that the insurers were liable for the loss. Mr. Justice Lansing, giving the opinion of the court, said, 'The insurance being entire, we are of opinion that the risk continued on the entire goods until twenty-four hours after all of them were landed.'(2)

Insurance was made on a ship and the cargo, 'to terminate when she might receive on board a cargo or effects, with the intention of proceeding to the United States.' The risk was held not to terminate on the ship's having received on board, from other ships, a part only of her cargo intended to be brought to the United States.(3)

Lord Ellenborough says, 'Although I have never hitherto met with a policy by which the responsibility of the underwriters was suspended and the risk divided into discontinuous halves, such a policy may doubtless be framed.'(4) And Chancellor Lansing says, 'that a risk once commenced cannot be apportioned.'(5) This has been frequently said, but it must be understood to have reference to an apportionment of the premium, since the policy may certainly be suspended and again revive.

Thus where a policy was on the cargo of the schooner Catharine, 'from Marblehead, to one or more ports in the West Indies, and at and from thence to Marblehead,' while the vessel lay at Cape St. François, a part of the proceeds of the outward cargo was lost on shore, in the possession of the consignee. The court held that this loss was not within the risks of the policy which were confined to perils of the seas, and also that the property when lost was not of the description insured, namely, the cargo of the schooner Catharine.(6) But there can be no doubt that if the same property had been taken on board, and become cargo, it would have been within the risks of the policy. Though there was one premium, and one entire risk, that risk was suspended and divided into two discontinuous portions. It is the same in every case of insurance for the outward and return voyage against marine risks only, where one entire risk is described and one premium only given.

The risk is interrupted and suspended, in like manner, where liberty is given to touch and trade during the voyage, if in using this liberty, the goods sold or purchased are on land, at any time in the course of such trade, while they are the property of the assured. While the goods are not exposed to the perils assumed by the insurers, either by not answering the description of the subject in the policy, or because they are not in a situation liable to such perils, the risk is suspended and ceases for the time, but recommences on the goods coming within the description in

(1) *Gracie v. Mar. Ins. Co.* 8 Cranch. 75. See also *Brown v. Carstairs*, 3 Camp. 161.

The risk on goods insured until twenty-four hours after they are landed, continues till after they are all landed.

The risk to continue till the homeward cargo is taken on board.

Interruption and suspension of the risk.

(2) *Gardiner v. Smith*, 1 Johns. Cas. 141.

(3) *Ward v. Wood*, 13 Mass. Rep. 539.

(4) *Mackenzie v. Shedden*, 2 Camp. 431.

(5) 2 *Caines' Cas.* 72.

(6) *Martin v. Sal. M. Ins. Co.* 2 Mass. Rep. 420.

- (1) *Bondrett v. Hentigg*, 1 Holt, 149.
 (2) *Pelly v. Roy. Ex. Ass. Co.* 1 Burr. 341.
 (3) *Col. Ins. Co. v. Lynch*, 11 Johns. 240.

The risk on goods is suspended, at an intermediate port, only while they are on shore.

the policy, and being again liable to the perils insured against. But the risk is not so interrupted in case of the goods being landed in consequence of the perils insured against in the policy,⁽¹⁾ or where the tackle of the ship is on shore while the ship is repairing, or for any other necessary and usual purpose, in the course of the voyage.⁽²⁾

That the risk cannot be apportioned without some express provision,⁽³⁾ accordingly means, that what is described as one risk in the policy, or in other words, that for which an entire premium is given, cannot be divided, and the different portions of it estimated at certain proportional parts of the premium. This subject is considered under the head of return of premium.

Insurance was made, upon 'specie and merchandise out, and merchandise home, at and from Boston to ports in the islands of Sumatra and Java, for the purpose of disposing of the outward and procuring a return cargo, and thence to the port of discharge in the United States, with liberty to touch at the usual places, and trade thereat.' At Labouaga in the island of Sumatra, the captain contracted with Dato Bassow, the chief magistrate there, to exchange a chest of opium, being a part of the goods insured, for a certain quantity of pepper and for dollars. When pepper, of a value equal to that of two thirds of the opium, had been delivered on board, Dato requested that the opium should be landed and weighed, and said he would pay the balance in dollars. The opium was accordingly landed. While they were occupied in weighing it, Dato demanded new terms of agreement, upon which the captain proposed to take the opium on board, and pay in dollars for the pepper which he had received. Dato consented to this proposition, but just as the opium had been put on board of the boat to be carried back to the ship, and while it rested on the gunwale of the boat, his men, in obedience to his orders, seized it by violence, the captain not having a sufficient force to resist them. Dato gave the orders, in pursuance of a previous design to plunder or cheat the captain. It was insisted in behalf of the insurers that the risk on the opium had ended, as soon as it was put into the scales to be weighed. Mr. Justice Sedgwick, in giving the opinion of the court, said, 'The underwriters were discharged whenever the property was landed in good safety, whether at the termination of the voyage or at any intermediate port. The insurers, knowing the nature of the voyage, insured the plaintiff against the restraint and detention of princes, *for the purpose of disposing of the outward and procuring a return cargo*; and while executing this purpose, the property was violently seized, while resting on the gunwale of the boat, at that time in possession of the crew. It may well be said that the property was never safely landed, and consequently, when it was lost, the loss was occasioned by a risk insured against. During the voyage the goods were as much protected by the policy, in the boats, while they were employed as auxiliary to the legitimate purposes of the voyage, as they were on board the ship. For all the purposes of the voyage, boats so employed are very reasonably considered as a part of the ship.'⁽⁴⁾

- (4) *Parsons v. Mass. F. & M. Ins. Co.* 6 Mass. Rep. 179.

CHAPTER XII.

DEVIATION AND CHANGE OF THE RISK.

A **DEVIATION** is the increasing or varying the risks insured against, without necessity or reasonable cause.

Where the insurance is described to be on a particular voyage, the meaning of this description, as well as of the language used by the parties in other parts of the policy, must be ascertained by its *general acceptance* and the *common usage*. By a *voyage* is generally understood the sailing from one port to another with all practicable, safe, and convenient expedition; this being the usual way in which a voyage is performed. In some voyages, however, it is customary to prolong the risk by touching at intermediate ports, as in India voyages, or others of great length, or by delaying to discharge the cargo immediately after arrival, as in voyages to the coast of Labrador, or of Africa; and the parties are supposed to be acquainted with such custom, and have it in contemplation when they make their contract. The meaning of the parties is therefore presumed to be, that the voyage is to be pursued in the most direct and safe course, and the adventure conducted, in general, in the most expeditious manner, as far as is consistent with safety; and if there be any departure from such course, or mode of conducting the adventure, whereby the risks insured against are varied or increased, it behoves the assured to justify such departure by showing either a usage in that respect, or a reasonable necessity for it. This he must do if the risks insured against are thereby increased or altered; for what the assured or his agents may do is of no concern to the underwriters, any further than the risks they have taken upon themselves are affected.

In a policy upon a voyage the parties are presumed to intend that the voyage shall be pursued in the usual manner.

A deviation is therefore not merely a going out of the direct or usual course of the voyage, but it comprehends unusual and unnecessary delay, or any other act of the assured or his agents, which, without necessity or just cause, increases or changes the risks included in the policy. But the assured may expose his property to any unusual or additional risks, provided the risks in the policy are not thereby increased or altered, or if it appears that a loss by those perils could not have been occasioned, in any degree, by such extraordinary peril. Thus where insurance is made on the cargo for the outward and homeward voyage, and the insurers are not liable for the risk of the goods on shore, at the port of destination; however great the risk may be to which the assured may expose the goods while they are on shore, it cannot concern the underwriter, or affect the contract, as long as the perils insured against are not changed. The goods are in this case, for a short time, put out of the condition

in which the policy supposes them to be; but when they come again within the conditions of the policy, the risk revives. So if the vessel has liberty to touch at sundry ports on the voyage, it is not a deviation to pass some of those ports without touching.

In the first of these instances the goods insured are withdrawn for a time from all the risks in the policy, in the last, a part of the voyage insured is omitted; in one case the risk ceases for a certain time, in the other, that of performing a part of the voyage is not incurred. The risks insured against, to which the property is in fact exposed, are not increased or changed, and accordingly there is no deviation. It has been said, that 'where the risk is for one entire voyage the contract cannot be suspended and revive again; if it be suspended at all, it is determined.'⁽¹⁾

(1) *Pelly v. Roy. Ex. Ass. Co.* 1 Burr. 344.

But this doctrine seems to admit of exceptions. If the assured puts the property for a time into a situation in which the insurers are not liable for a loss upon it, and afterwards it is brought within the conditions of the policy, and in such a manner that the risks insured against cannot possibly be changed, there seems to be no reason why the liability of the insurers should not revive. The assured relieves them of the risk for a time, that is, he discharges them from a part of the risk against which they agreed to indemnify him, but this appears to afford no ground for holding that they are thereby discharged from all subsequent liability. The insurers are not in general liable for the risk on goods carried upon deck. Suppose that a package of goods insured, should be carried on deck for a part of the voyage, but in such a manner as not in the least to embarrass the navigation of the ship, and should afterwards be stowed in the hold, so as to be within the conditions of the risk; although the insurers might not be liable for a loss upon the goods while they remained on deck, it seems to be a very strict construction to say that the risk would not attach on the goods when they were properly stowed. But there does not appear to be any decision to this effect; the incidental remarks of judges, on the contrary, seem rather to tend to the opposite doctrine. The preceding observations must therefore be received rather as the suggestion of a query, than the statement of any established principle. That the risk may cease for a time and then revive again, cannot be doubted, as in the case of one entire risk for the outward and homeward voyage; but whether there may be any other instances of the interruption of an entire risk, and what instances of this sort there may be, if any, is a matter of some doubt.

A risk unnecessarily incurred is not a deviation, if it does not change the risks insured against.

A new risk, not within the policy, may be incurred and run at the same time that the risks insured against continue, and it is not necessary, in order to prevent a deviation in such case, that the goods should, during the continuance of such extraordinary risk, be withdrawn from the risks in the policy. The master of a neutral ship left the ship's register and sea-letter at the Isle of France, and so exposed the ship to the risk of detention by the belligerents, for want of documents to show her neutrality, and it was held not to be a change or increase of the risk in the nature of a deviation. But as these documents were left behind

through the fault of the master, the insurers were not liable for any loss occasioned by the want of them.(1) In this instance the assured incurred an extraordinary and unnecessary risk, which was not considered to be a deviation. The same doctrine has been adopted in other cases.(2)

But the enumeration of the risks, in the common form of the policy, is so comprehensive, that it is not easy to expose the property to any risks not insured against, without increasing or changing those that are included in the policy. Under the common form of the policy, therefore, it will generally be true, that exposing the property to any other than the usual risks on the same voyage or adventure, will in fact be altering or increasing the risks which the underwriter takes upon himself. But this is not always the case, and therefore it is necessary to keep in view that a deviation is a change or enhancement of the *risks insured against*. Where only a part of the usual risks are included in the policy it is of more importance to keep in view this distinction.(3)

The consequence of a deviation is not to make the policy void, but to discharge the underwriters from their liability for any subsequent loss.(4) Though a deviation is spoken of in some cases as *vacating* the policy,(5) and in some as *avoiding* it,(6) yet it is generally said to *discharge* the underwriters; and wherever the point has come distinctly before any court, it has been held only to discharge them from all *subsequent losses*. The reason is not that the property is thereby exposed to risks not insured against, nor that it ceases to be liable to the identical risks that are insured against, both of which may happen as we have seen without any deviation, but it is, that the risks within the policy are so affected, and varied, and confounded with others, that it is impossible to show that a loss would have happened but for the deviation.

A deviation is essentially different from a breach of warranty, which is the violation of an express or implied engagement on the part of the assured, whereas the superinducing of additional and extraordinary risks, or the change of the risks insured against, is not a violation of any agreement express or implied. Risks may be voluntarily incurred, as long as those assumed by the underwriter are not affected. But when an extraordinary risk, not contemplated by the parties in making their contract, is of such a kind that it becomes impossible to say that it may not have indirectly contributed to a subsequent loss, occasioned immediately by one of the perils in the policy, the assured cannot thereafter show that he has sustained a loss by one of the perils insured against, as they were understood by the parties to the contract when it was made; and unless he can show this, he is not entitled to any indemnity under the contract. If, for example, the vessel unnecessarily delays, or goes out of the usual course of the voyage, she is not after that time exposed to the identical sea perils, to which she would have been exposed had she pursued the voyage expeditiously in the usual course. The risks insured against become altered, and upon this ground Lord Mansfield places deviation, when he says, 'The true ob-

(1) *Cleveland v. Un. Ins. Co.* 8 Mass. Rep. 308. See also *Richardson v. Maine Ins. Co.* 6 Mass. Rep. 102.
(2) *V. Supr.* 124.

(3) For definitions of deviation and general remarks upon it, see *Roc. n. 52*; *Doug. 291*; *13 Mass. Rep.* 447.
(4) *2 Salk.* 444; *2 Lord Raym.* 840; *6 Mass. Rep.* 121; *7 Mass. Rep.* 352; *9 Mass. Rep.* 447.
(5) *1 Taunt.* 454.
(6) *4 Esp.* 26; *Park, 438*; *Condy's Marsh.* 203. n.

Difference between a deviation and a breach of a warranty.

jection to a deviation is not the *increase* of the risk; it is, that the party contracting has voluntarily substituted another voyage for that which has been insured.'(1)

Change of the ship.

(1) *Lavabre v. Wilson*, Doug. 291; *Stetson v. Mass. Mut. F. Ins. Co.* 4 Mass. Rep. 338.

(2) *Millar*, 394; 1 Emer. 425. c. 12. s. 16; 1 Burr. 351; *Molloy*, b. 2. c. 7. s. 11.

Goods on deck.

(3) *Plantamour v. Staples*, Marsh. 169. S. C. 1 T. R. 611. n.

(4) *Schieffelin v. New York Ins. Co.* 9 Johns. 21.

Insurance on a ship *safely* moored.

(5) *Backhouse v. Ripley*, Park, 26; *Ross v. Thwaite*, Park, 26.

(6) *Da Costa v. Edmunds*, 4 Camp. 142. See 2 Valin.

203. h. t. a. 13. n. & 1 Val. p. 397. tit. du capitaine a. 12. n.

(7) ——— v. *Westmore* 6 Esp. 109.

Intermediate voyage.

Policies on goods generally describe them to be on board of some particular vessel, and if the risk be unnecessarily changed by putting them on board of a different ship, it is a deviation.(2) But if the vessel on board of which the goods are shipped, is lost or disabled, the goods must necessarily be transhipped.(3) And the loading of them on board of another ship, instead of discharging the underwriters, may be requisite, in order to prevent them from being discharged from subsequent losses, in consequence of the voyage being voluntarily given over. It has been held to be the duty of the captain, in such case, to procure another vessel to carry on the goods to the port of destination, if this can be conveniently done, upon reasonable terms, considering all the circumstances, and without any extraordinary delay.(4)

Insurers are not generally liable for the loss of goods stowed on deck, since the goods are exposed to greater peril than if they were stowed in the usual manner.(5) But this seems to depend in some degree upon usage. The insurers on 40 carboys of vitriol objected to paying a loss, because the vitriol was stowed on deck. Lord Ellenborough left it to the jury, to say, 'whether it was usual to carry vitriol on the deck. If there was a usage to carry vitriol on deck the underwriters were bound to take notice of it.' And the other judges afterwards acquiesced in this opinion.(6)

A policy was made on the ship *Hero*, 'during one month's remaining in Portsmouth harbour, securely moored.' The ship was removed twice during the time, which was objected to as changing the risk, but Lord Ellenborough said, 'The terms of the policy warranted a removal from place to place, within the harbour of Portsmouth.'(7)

Where there is a known usage as to the course, or touching at particular ports, or any thing else in the conduct of the voyage, the parties are supposed to be acquainted with such usage, and have it in view when they enter into the contract.

It has been the uniform practice of the British East India Company, in hiring ships for India voyages, to reserve in the charterparty the liberty of employing them on an intermediate voyage, from one port to another in India, and totally distinct from the principal voyage. This being the invariable mode of chartering vessels, it was understood that an *India voyage*, included in it the liability of the ship to be employed on such intermediate voyage. When insurance was made on a vessel for an India voyage, therefore, it was understood by the parties, and construed by the courts, to be an insurance on the vessel, not only for a voyage to a port in the East Indies and back, but also for such intermediate voyage, if the company saw fit to send the vessel on such a voyage. Accordingly it was held not to be a deviation to suspend the main voyage for this purpose,

and the vessel continued to be at the risk of the underwriters during both the intermediate and the principal voyage.(1)

It is the usage for English vessels, engaged in voyages from Newfoundland, to fish on the Banks, or make a voyage to Quebec or some neighbouring port, before they begin to take on board their cargoes for Europe. An insurance was made, August 28th, 1807, on the ship *Courier*, her cargo and freight, 'lost or not lost, at and from any port or ports in Newfoundland, to any port in the United Kingdom.' The *Courier* arrived at Newfoundland in June, and was employed in fishing until the 13th of October, when she began to take in her homeward cargo. She foundered at sea soon after sailing. It was contended that as the policy was on the cargo, *lost or not lost, at and from Newfoundland*, the risk commenced on the first arrival of the ship at Newfoundland, and accordingly that the delay for the purpose of fishing was a deviation; or if not, the delay to commence the voyage was a deviation. Lord Ellenborough said, 'It is notorious that ships in this trade, upon their arrival at Newfoundland, are either employed in taking fish upon the Banks, or take an intermediate voyage. This must be presumed to be equally in the knowledge of both parties. Things are presumed to go on in their ordinary course.'(2)

A case on a policy for a voyage from the same place came before Lord Eldon. The policy was on fish, at and from Newfoundland to Portugal. The ship arrived at Newfoundland on the 21st of July, whence she went to Sidney for a cargo of coal, and returned to Newfoundland in the beginning of October, where, before the 8th of November, she took on board a cargo of fish, with which she proceeded for Oporto, and was lost on the voyage. It was objected against the claim for the loss, that the voyage had been delayed, and the risk thereby increased. Lord Eldon said to the jury, 'I think the practice of the trade in this case is as capable of being received in evidence, as the practice in other cases in which it has been admitted. There is no doubt that the policy, *prima facie*, means the first cargo which shall be laden after the ship's arrival, but the underwriter must refer himself to the usage of the trade, which he is bound to know. The first question will be, whether there is such a usage here. If the evidence leads to this, that the ship may make an intermediate voyage of several years, it is too dangerous for you to give it effect. If several ships, belonging to a merchant, arrive together at Newfoundland, and finding cargoes for some only, he *bona fide* sends the rest on an intermediate voyage, it seems reasonable; though studiously sending a ship on an intermediate voyage, out of her turn, would be a deviation. The second question is, whether this ship has been employed otherwise than as the usage warrants. If you think the usage does exist, if you think it reasonable, and if you think the ship acted *bona fide* in taking the intermediate voyage, you will find for the plaintiff.'(3)

The case more particularly referred to in the two last, was an action upon a policy on goods from England to the coast of

(1) *Salvador v. Hopkins*, 3 Burr. 1707; *Gregory v. Christie*, Park, 83; *Farquharson v. Hunter*, Park, 84; *Grant v. Paxton*, 1 Taunt. 463; *Grant v. Delacour*, 1 Taunt. 466.

Insurance to or from Labrador and Newfoundland.

(2) *Vallance v. Dewar*, 1 Camp. 503.

(3) *Ougier v. Jennings*, 1 Camp. 506. n.

Labrador, to continue until the goods should be discharged and safely landed; and the vessels on arriving there, instead of unloading, were employed nearly two months in fishing, during which time a part of the goods remained on board. At the end of that time they were captured. On the assured's claiming the loss, it was objected that there had been an unreasonable delay in discharging the cargoes. Lord Mansfield said, 'that question was to be tried by the jury, and could only be decided by knowing the usual practice of the trade. Every underwriter is presumed to be acquainted with the practice of the trade he insures, and that, whether it is recently established or not. It is no matter if the usage has been only for a year.'⁽¹⁾

(1) *Noble v. Kennoway*, Doug. 510.

Two instances do not make a usage to touch at a place.

(2) *Bentaloe v. Pratt, Wallace's* Rep. 64.

An insurance of any particular voyage will imply the liberty to touch at a port, if that be the usage, though the policy contain no express provision for this purpose.⁽²⁾ But it must appear that this course is so uniformly pursued that it may be presumed to be known to the parties. In the case of an insurance of goods 'from Kingston to Aruba, and at and from thence back to Kingston,' it was agreed 'that the vessel might take in the whole, or a part of her cargo at Coro.' The vessel took in a person at Aruba, to assist in purchasing mules at Coro, and in returning from Coro, she touched at Aruba to leave him. While she was there, the place was taken by the Dutch, and the vessel and cargo captured and condemned as prize. It was objected that the touching at Aruba, on the return, was a deviation. The assured attempted to prove that it was the course of the trade to stop at Aruba for a supercargo to assist in purchasing the mules, and in returning to call and land him. A witness stated two instances of vessels that had done so. But the court thought the usage was not proved, and accordingly were of opinion that it was a deviation.⁽³⁾

(3) *Martin v. Del. Ins. Co. Condy's* Marsh. 186. n.

A vessel lies outside of the bar of the harbour of Oporto to take in a part of her cargo.

Under the voyage, as such, is comprehended the usual mode of taking the goods on board. A policy being made on a ship 'at and from Oporto to London,' the ship having taken in a part of her cargo withinside the bar of Oporto, went outside, to take in the remainder, when she was driven to sea in a gale of wind, and captured. It was objected that the underwriters had not been informed that she was to take in any part of her cargo outside of the bar. But it was proved to be usual to do so, when, from the state of the river, vessels could not conveniently load entirely withinside; and though it appeared that in some policies 'at and from Oporto,' liberty was expressly given to load on either side of the bar, Lord Ellenborough held, 'that the underwriters were bound, of themselves, to take notice of the usage.'⁽⁴⁾

(4) *Kingston v. Knibbs*, 1 Camp. 508. n.

The parties may exclude a usage by express provisions in the policy.

But any such usage as to the course of the voyage or conducting of the adventure, may be restrained by express provisions in the policy, and although no express provision is made directly on the subject, yet if it appear from the tenor and general provisions of the instrument, that the usual liberty is not intended to be given, the character of the voyage and the rights of the parties will be modified accordingly. Where the policy

on an East India voyage, contained expressions showing that the parties intended to exclude the risk of an intermediate voyage from one port of India to another, the court held such intermediate voyage to be a deviation.(1)

(1) *Lavabre v. Wilson*, Doug. 284.

Upon the principle that by the voyage in the policy, is meant a voyage prosecuted in the usual way, and with the customary chances and advantages in favour of the underwriters, it has been decided in an action on a policy upon goods 'from London to Jamaica,' that the captain's taking one course to which he was limited by his orders, instead of being left to choose from three different courses according to his discretion, was a deviation. It appeared that from a certain point in this voyage there were three courses, two to the south, and one to the north of St. Domingo, and that on arriving at this point, it was customary for the captain to use his discretion which of these courses to take, according to the circumstances at the time, sometimes one being preferable, sometimes another. In this case, however, the captain was directed to take the northern course, for the purpose of calling at Cape St. Nicholas Mole, there being, however, no liberty given in the policy to touch at that port. After passing the dividing point, the vessel, while proceeding on the course for both Cape Nicholas Mole and Jamaica, and before turning off to the former, was captured. Lord Kenyon was of opinion, 'that the underwriter was discharged, because the captain, under the compulsion of his orders, had taken this particular track, and was not left at liberty to exercise his judgment at the dividing point for the benefit of all concerned. It must be taken for granted that the insurer knew what was the common course of the trade, and expected that the most expedient voyage would be pursued by the captain, according to the emergency of the occasion.' And this was the opinion of the whole court.(2)

The captain is ordered to take one of three courses, instead of being left to choose.

(2) *Middlewood v. Blakes*, 7 T. R. 158. See also *Carter v. Roy. Ex. Ass. Co.* 2 Str. 1249.

If insurance be to two or more ports, the vessel may sail for either, or any of them, but they must be visited in the order in which they are described in the policy. Under a policy on goods, 'from Liverpool to Palermo, Messina, Naples, and Leghorn, provided the French should not be at Leghorn,' intelligence being received that Leghorn was in possession of the French, the vessel cleared out and sailed for Naples *only*, and was captured in the Bay of Biscay. It was objected on the part of the underwriter, that, though it was competent to the assured to go to Palermo only, or after going to Palermo, to stop at Messina, without proceeding to Naples, because the order described in the policy would still be preserved, as far as the voyage was pursued; yet he was not at liberty to omit either of the places first named, and go directly to a subsequent port; for by so doing the course of the voyage is altered, and another course substituted for the one intended by the parties. It was insisted that it was no answer to say that the voyage substituted is better for the underwriter; he is to judge of that when he enters into the contract, and it will be a sufficient defence for him, if the voyage proceeded on, be different from that which he contracted to insure. Lord Ellenborough thought 'that the

A vessel insured to different ports may omit some of them

voyage insured to Palermo, Messina and Naples, meant a voyage to all, or any of the places named; with this reserve only, that if the vessel went to more than one, she must visit them in the order described in the policy.' Le Blanc, J. said, 'The meaning of the policy is, that the ship may go to Naples, with the liberty to go there by the way of Palermo and Messina.' And the other judges were of the same opinion.(1)

(1) *Marsden v. Reid*, 3 East, 572.

A similar opinion has been given in New York, in an action on policies upon a vessel and cargo, 'from New York to Antigua and thence to Curraçoa.' The vessel sailed for Curraçoa without touching at Antigua, and was captured. This was alleged to be a deviation. Mr. Justice Thompson gave the opinion of the court that, where the vessel visited more than one port, the order described in the policy must be pursued. 'But the assured is not obliged to go to all the ports mentioned, but may go to only one of them.'(2)

(2) *Kane v. Col. Ins. Co.* 2 Johns. 284. See also *Cross v. Shuttcliffe*, 2 Bay, 220.

Insurance being made for a voyage from London to the ship's discharging port or ports in the Baltic, 'with liberty to touch at any port for orders or any other purpose;' it was held that, before choosing a port of discharge, the vessel might sail back to ports she had passed, but after determining on the port of discharge, she could touch at other places only in their order on the way to the discharging port.(3)

(3) *Andrews v. Mellish*, 5 Taunt. 496.

Insurance was made on ship and cargo, 'from Newburyport, to one or more places beyond the Cape of Good Hope, one or more times, for the purpose of disposing of the outward, and procuring a return cargo; and at and from them, or either of them, to the United States.' Under this description of the voyage, Mr. Justice Sedgwick gave the opinion of the court that, 'the vessel was authorized to touch and trade at the Cape, and to go to the Isle of France, and from thence to any other ports beyond, and return from such ports immediately to the United States, or stop at the Cape in the passage; but not to sail from the Isle of France to the Cape, and again to return to the Isle of France.'(4)

(4) *Coffin v. Newbpt. Ins. Co.* 9 Mass. Rep. 436.

Whether the order of ports as named in the policy must be followed though it is not the geographical order.

It has been held in one case that a vessel insured to successive ports, must touch at those ports in the order in which they are named in the policy, although this is out of the geographical order; unless there is a usage to the contrary; for it seems that such a usage would authorize the touching at the ports in an order different from that in which they stand in the policy. A vessel insured 'from Gothenburg to Leith and Cockenzie,' put into Cockenzie first, which was about a mile and a half out of the course to Leith, the two places being about two miles distant from each other, and Leith at a greater distance from Gothenburg. Evidence was admitted to show what was the usage of the trade, as to the order in which the ports were to be visited, which usage would have been of no importance in the case, and accordingly no proof of it could have been admitted, unless it would have justified a departure from the order in which the ports were named in the policy. The touching at Cockenzie first, was held to be a deviation, though that port occurred first in geographical order from Gothenburg.(5)

(5) *Beatson v. Haworth*, 6 T. R. 531.

The ground upon which a usage would authorize the assured to vary from the order of naming the ports in the policy, is, that a construction of any particular provision of an instrument, must be governed by the objects and general tenor of the instrument. Where a policy is made upon a particular voyage, the usages relating to such voyage are implicitly referred to by the contract, and in a degree made a part of it. Accordingly the usage, whether it be to follow the geographical order or vary from it, is understood to be comprehended in the general description of the voyage. It appears from the preceding case that the naming of ports in the policy in an order different from that in which vessels bound upon the same voyage usually stop, does not conclusively show that the parties intended to vary from the usage. Whether they so intended or not, will be a question of construction upon the whole instrument, considered in reference to the particular voyage insured, and the subject matter of the contract.

Goods on board of the *Good Hope* were insured on a voyage 'from London to Trinidad, or any ports of discharge in the Spanish Main, all or either, with leave to call at any of the West India Islands, Jamaica and St. Domingo excepted, and to touch and stay at any ports whatsoever, for convoy or trade.' The vessel proceeded to Demerary, and from thence, after two days, ran down in sight, successively, of Tobago, St. Vincent's, and St. Lucia, and touched at Martinique; after staying four days there, she shaped her course for St. Thomas's, passing by St. Kitts, and in the night struck on the Anegada Reef, where she was lost. The cargo was saved, but damaged to the amount of sixty-two per cent, which loss was claimed of the insurers, who, in defence, alleged a deviation. They contended that the vessel was authorized to touch at ports only in their geographical order, computing their distance from London; or in the order in which they were named in the policy. The master had received no orders to proceed to Trinidad or the Spanish Main, after touching at Martinique and St. Thomas's. Witnesses said it was easy to run down to any islands or settlements to the leeward, but difficult to beat up from the leeward islands to the Spanish Main, and that, if it was still intended to go to Trinidad, or the Spanish Main, or any island or settlement to the windward, the beating up from Martinique or St. Thomas's for this purpose, would have been a deviation. They thought that the liberty of touching at any or all of the islands, must be taken by touching in the order in which they occurred in the usual course of the voyage, without going backwards and forwards. They said it was not usual to go to Trinidad and then to the Spanish Main; that a vessel might make Trinidad from the Main in two nights, but that possibly a month might be consumed in beating up from Trinidad to Demerary. It appeared, therefore, that a vessel going to Demerary, and Trinidad, or Martinique, ought to touch first at Demerary. Chief Justice Mansfield 'was of opinion, that under these circumstances, and considering the extensive liberty given in the policy, the assured might take

the islands in the order most convenient to him.' And the verdict of a special jury was in conformity to this opinion. But the same judge afterwards gave the opinion of the court that there should be a new trial, because 'it had never been distinctly left to the jury, whether the vessel was in her voyage to Trinidad at the time of her loss.' He said, 'Though I was struck at the trial with the largeness of these words, giving liberty to the ship to go any where she pleases, it must be confined to the voyage insured, that is, to Trinidad and the Spanish Main. Otherwise, I do not see where the voyage is to end. They might make it last two years, by going to every West India Island except St. Domingo and Jamaica. The larger the words are, the more necessary is this construction, else the ship might trade without any limitation.'⁽¹⁾

(1) *Gairdner v. Senhouse*, 3 Taunt. 16.

Courts will not give a construction to the provisions of the policy, in regard to a liberty of touching at ports, narrower than the necessary import of the words.

But however large the provisions of the policy are, in giving a liberty to touch at ports, the court will give them effect to the extent of the obvious and necessary import of the words. In a case on a policy upon goods, for a voyage 'at and from Martinique, and all, or any of the West India Islands, to London, beginning the adventure upon the goods from the time of the loading thereof on board,' with liberty 'to touch and stay at any ports whatever;' the ship sailed from Martinique for St. Domingo, which was much out of the direct course to London. The premium given was ten per cent, whereas the usual premium for the same voyage, by the way of St. Domingo, was eighteen per cent. It was insisted, in behalf of the underwriters, upon the authority of the preceding case, that there had been a deviation. Chief Justice Mansfield said, there was no getting over the words of the policy; 'instead of *all*, you must substitute *some* of the West India Islands, such as lie between Martinique and London; you would make quite a new engagement. Though, from the difference of the premium, it is possible the underwriter may not have attended sufficiently to the terms of this contract, yet we cannot make new contracts for persons.'⁽²⁾ In this case the vessel not only had the general liberty of touching at any ports whatever, which might have been restrained by construction to the ports in the course of the voyage, but was also insured from *all and any* of the West India Islands. It was the plain and necessary import of this description of the voyage, that the vessel might touch at all those islands, provided she took them in their order on a voyage that was to terminate at London.

(2) *Bragg v. Anderson*, 4 Taunt. 229.

Liberty to touch at all places, and for any purpose, is restrained by construction.

(3) *Lavabre v. Wilson*, Doug. 284; *Langhorn v. Allnutt*, 4 Taunt. 517.

The principle of the decision in the preceding case, is, that the liberty to touch, or trade, or stay, though expressed to extend to all places for all purposes whatsoever, is construed to extend only to ports in the course of the voyage insured, and for purposes connected with the voyage. It authorizes touching at ports where ships bound on the same voyage do not usually touch, since this clause would otherwise have no effect.⁽³⁾ It therefore authorizes going out of what is strictly the course of the voyage. Accordingly, when it is said that a general liberty of touching at any ports extends only to ports in the course of the voyage insured, the meaning is, that the vessel is not permitted

by this liberty to sail in an opposite direction, or to a port very wide of the usual course.

A vessel insured from Hull to her port of lading in the Baltic, 'with liberty in said voyage to proceed and sail to, and touch and stay at, any ports whatsoever and wheresoever, for all purposes; particularly at Elsinore;' took goods to be delivered at Elsinore, Dantzic, and Pillau; the last, being her intended port of lading. She was lost in sight of Pillau, after having delivered goods at Elsinore and Dantzic. Abbott, C. J. 'The liberty to touch at any ports for all purposes, must mean for purposes connected with the voyage. If the ship had gone to Elsinore, or Dantzic, to see if she could get a cargo, that would have been connected with the voyage, but she went for the purpose of delivering goods, which was wholly unconnected with the object of the voyage insured.(1)

(1) *Solly v. Whitmore*, 5 B. & A. 45.

A ship was insured from Para to New York, 'with liberty to call at any of the Windward or Leeward Islands.' The captain called at two of those islands to learn the state of the markets, that his employers might be able to judge whether it was best to send a cargo thither from New York. Abbott, C. J. 'This calling at St. Bartholomew's and St. Thomas's, was for a purpose wholly unconnected with the voyage. It had reference to some new adventure.' It was accordingly held to be a deviation.(2)

(2) *Hammond v. Reid*, 4 B. & A. 72.

But where the policy gives the general liberty of touching at ports, the construction of this permission may be enlarged by the other provisions of the policy or the nature of the voyage insured. A ship insured, 'at and from Antigua to England, with liberty to touch at all or any of the West India Islands, Jamaica included,' not being able to procure a full cargo at Antigua, sailed to St. Kitt's, in order to complete her cargo there. St. Kitt's is out of the course of the voyage from Antigua to England. Chief Justice Gibbs said, 'The policy appears to me to have authorized the ship to go to St. Kitt's, and to remain there till her homeward cargo was completed. There is a liberty to touch at all or any of the West India Islands, Jamaica included; this shows decisively that they might be taken without any regard to their geographical order. Jamaica is at least 500 miles out of the direct course to England.'(3)

General liberty to touch at ports may extend to ports out of the course of the voyage.

(3) *Metcalfe v. Parry*, 4 Camp. 123.

(4) *Hogg v. Horner*, Park, 444.

(5) *Elliot v. Wilson*, 4 Brown's P. C. 470.

A ship was insured 'at and from Lisbon to a port in England, with liberty to call at any one port in Portugal for any purpose whatever.' The ship sailed from Lisbon, southward, to Faro, to complete her loading. Lord Kenyon held this to be a deviation, being of opinion that the policy only gave permission to call at some port to the northward of Lisbon, and in the course of the voyage to England.(4)

Liberty to call at any one port in Portugal, means a port in the course of the voyage.

Liberty to touch at a port named in the policy will not authorize the touching at another, although it is no more out of the usual course of the voyage.(5)

Liberty to touch, extends only to the port named.

The liberty of using any kind of papers does not authorize the going out of the course of the voyage to exchange papers. Insurance was made upon ship, freight, and cargo, 'from South

Liberty to take any kind of papers,

does not authorize going out of the course of the voyage on account of them.

(1) *Stocker v. Harris*, 3 Mass. Rep. 409.

Conditional liberty to touch.

(2) *Duerhagen v. U. S. Ins. Co.* 2 Serg. & Rawle, 309.

(3) *Bond v. Gonsales*, 2 Salk. 445; *Bond v. Nutt*, Cowp. 601.

Warranty to sail with convoy implies the liberty of seeking it.

Liberty to join convoy must be used with the least practicable interruption of the voyage.

America to the vessel's port of discharge in the United States, under whatever papers she might sail.' The vessel sailed for Havana from Vera Cruz, which port she had entered under Spanish colours, and with Spanish papers; and she was captured by a British man of war, while on the common course to Havana and the United States. The property was afterwards condemned as Spanish at Jamaica; Great Britain being then at war with Spain. The vessel could not have been cleared out at Vera Cruz, for the United States under Spanish colours, nor could she be cleared out without giving a bond to land the cargo at some port of the Spanish dominions. It was intended to restore the American character of the vessel at Havana. In behalf of the insurers it was objected, that the sailing for Havana was a deviation. Mr. Justice Sewall, giving the opinion of the court, said, 'A change of the papers was expressly licensed by the policy; but it would be an unreasonable construction to say that the assured had, under that license, an authority to engage the insurers in an unlimited voyage. The ship was destined to Havana, because one of the house happened to reside there. But if he had not been there, or had died before the arrival of the ship, then, by the force of the same necessity, a voyage to Teneriffe, had been equally excused. It is not that real and imperious necessity, which justifies a change of the risk.'(1)

A conditional liberty to touch at a port must be taken advantage of strictly within the condition. A policy was made on goods, for a voyage from New York to Bremen, 'with liberty to enter a Dutch port, when informed on arriving on the Dutch coast, that it might be done with safety.' The captain upon arriving on that coast was informed, from two Dutch boats, that Amsterdam was not blockaded, and that he might proceed to that port 'without molestation from the British;' and in attempting to put in there he was captured by a French privateer. This was held to be a deviation. Tilghman, C. J. 'The policy requires information that the port of Amsterdam might be entered *with safety*. To enter *with safety*, it would seem necessary that there should be no danger from *any belligerent nation*. It was immaterial from what quarter the danger arose, whether from British blockading squadrons or French cruisers.'(2)

A warranty to sail with convoy implies the liberty of seeking and joining convoy, and consequently of going out of the usual course of the voyage for this purpose. The vessel may seek and join such convoy as is provided for the voyage insured.(3)

If the policy expressly permit the vessel to join convoy, this liberty, although it be given in the most general and comprehensive terms, must be used by joining convoy at such place as will occasion the least interruption of the voyage. A policy on goods for a voyage from Heligoland to Memel, gave liberty 'to touch at any ports or places whatsoever or wheresoever, and to seek, join and exchange convoy.' The vessel joined convoy at Gothenburg. Bayley, J. said, 'If it had been proved that an earlier convoy might have been procured at another place, and that,

notwithstanding, the captain had omitted to join it, in order that he might sail to Gothenburg, that might perhaps have been a case of deviation.'(1)

It is not however necessary that the master should avail himself of the liberty to touch, trade, or stay at a port, or to join convoy; as a vessel insured to several ports may sail to either or any of them, provided they are taken in proper order, so the master may pass the ports at which the policy gives liberty to touch. Lord Ellenborough, speaking of the liberty to join convoy, says, 'It is not introduced into the policy by way of stipulation on the part of the assured, that they will seek and join convoy; but is granted to them for their benefit, and for the purpose of obviating any doubt as to its being a deviation, in case they should go out of the way in seeking convoy; but I am not aware that the restraining this liberty would vary the rights of the parties.'(2)

A vessel being insured from St. Ubes to her *port of discharge* in the United States, it was held not to be a deviation on arrival at a port in the United States, to wait there for instructions from the owner for what port of discharge to proceed.(3)

If the policy gives no liberty of touching at ports, it will be a deviation to stop unnecessarily at any port where vessels bound on the same voyage do not usually touch. Chief Justice Lee said, 'If the master puts into a port not usual, or stays an unusual time, it is a deviation.'(4)

It has been said that an unnecessary deviation of a mile, or delay of an hour, will discharge the insurers.(5) But courts do not usually apply this principle with such rigid and minute exactness, as to hold such a delay or departure from the course of the voyage to be a deviation. Circumstances like these are most frequently considered as coming within the maxim, *de minimis non curat lex*. It cannot however be said that any unnecessary and voluntary delay, or departure from the course of the voyage, is excusable merely on account of the shortness of the time or distance.

If the insurance be *at* and from a place, any unusual and unnecessary delay in commencing the voyage, after the risk commences, is a deviation.(6)

Where the policy is on goods 'until landed,' any unnecessary and voluntary delay to land them is a deviation.(7)

Under a policy on goods for a voyage from Dartmouth to Liverpool, the vessel put into Loo; a place that she must necessarily pass by on this voyage, but there appears to have been no usage, nor any liberty given in the policy, to touch at Loo. Mr. Justice Yates held this to be a deviation.(8)

Goods being insured on a voyage from Dunkirk to Leghorn, the vessel stopped at Dover to procure a Mediterranean pass. Lord Mansfield held this to be a deviation.(9)

The varying from the usual course of the voyage, and any extraordinary delay, must be justified by necessity, or it will be a deviation. In regard to what constitutes a sufficient necessity, different persons would no doubt entertain different opinions

(1) *Heselton v. Allnutt*, 1 M. & S. 52.

The assured is not obliged to use the liberty of touching at ports or joining convoy.

(2) *Heselton v. Allnutt*, 1 M. & S. 51.

(3) *King v. Middletown Ins. Co.* 1 Connect. Rep. 184.

A ship waits for instructions.

It is a deviation to stop at a port, if the policy gives no liberty for this purpose.

(4) *Tierney v. Etherington*, cited 1 Burr. 343.

(5) 9 Mass. Rep. 449.

(6) *Earl v. Shaw*, 1 Johns. Cas. 317.

(7) *Parkinson v. Collier*, Park, 470. See also Doug. 510.

(8) *Fox v. Black*, Exeter Assizes, 1767; Park, 438.

(9) *Townson v. Guyon*, Park, 438.

If the master acts with good faith the parties are bound by his acts.

upon the same facts. But it would be a very strict and illiberal construction, to hold a delay or departure from the course of the voyage, when it is expedient and necessary in the master's opinion, to be a deviation, because others, and more justly too, perhaps, should think it was unnecessary and inexpedient. Great weight is therefore allowed, to the fair and honest exercise of discretion on the part of the captain, in cases of this sort, as will appear from many of the judicial opinions subsequently cited.

(1) *Stocker v. Harris*, 3 Mass. Rep. 417.

Mr. Justice Sewall, speaking of a delay for the purpose of claiming the cargo which had been seized, says, 'The captain is the common agent of the concerned, and it is his duty to manage their interests according to his best judgment. Whatever is fairly done, with this purpose, is within the course of the voyage.'⁽¹⁾ Upon the principle that, in extraordinary circumstances, the master becomes the agent of all concerned, as far as he acts with good faith, and according to his best judgment, it is held that all parties, insurers as well as others, are bound by his acts. But to constitute the master the agent of the parties to this effect, two circumstances are requisite; the occasion must be extraordinary, and he must act with good faith and a deliberate exercise of his judgment.

The master must use his discretion within proper limits.

But courts prescribe limits to this exercise of discretion on the part of the master, and it may be a deviation to go out of the usual course, though it be done for the purpose of expediting the voyage. A ship and the freight were insured 'from Boston to Gibraltar, and from thence to her port of discharge in the United States, with liberty to proceed to St. Ubes or the Cape de Verd Islands for salt.' On arriving at the Isle of May, one of the Cape de Verds, she found so many vessels there, that her turn to load would not have come in less than four or five weeks. The governor of the island proposed to the master to go to St. Jago and Fuego for a cargo of provisions, and engaged that he should be loaded with salt as soon as he should return. This proposal was accepted by the master, who was thus enabled to load his vessel sooner than he would have been, had he remained at the Isle of May waiting for his turn. One reason given for accepting the governor's proposal, was the vessel's being short of provisions, which were scarce at the Isle of May. The vessel was lost in the homeward voyage. Chief Justice Parker instructed the jury, that if they were fully satisfied that the voyage to St. Jago and Fuego was undertaken for the purpose of expediting the loading of the vessel and the return home, without any intention on the part of the master to deviate from his voyage; and that the return home was in fact expedited by that circumstance; and that the stay at the Isle of May for her turn to load would have been hazardous on account of the scarcity of provisions and water; it was not a deviation. On a motion for a new trial the same judge gave the opinion of the court, 'That the vessel should have been sufficiently found at Gibraltar, to enable her to stay and load at the Isle of May, without depending upon procuring provisions there,' and if she was not

so, it was the fault of the master, which could not be alleged in excuse of a deviation. In regard to the expediting the voyage insured, the opinion of the court was, that 'masters have not a right to speculate in this manner upon the possible advantages of pursuing a route which does not belong to the voyage. They are to pursue the usual course, and let the consequences fall where they may.' Accordingly, the intermediate voyage to St. Jago and Fuego was considered to be a deviation.⁽¹⁾ The principle of the decision seems to be, that this was not such an extraordinary occasion as authorized the master to act according to his own discretion, in respect to departing from the usual course of the voyage.

(1) *Kettell v. Wiggin*, 13 Mass. Rep. 68.

A decision has been made in New York upon the same principle. A vessel was insured for a voyage from New York to Teneriffe, 'with permission to proceed from Teneriffe to the Isle of May and Bonavista, and at and from them, or either of them, to New York.' The vessel, on arriving at Teneriffe, was required to perform a quarantine of forty days, because her bill of health had not been certified by the Spanish consul at New York. With a bill of health so certified, she would have been subjected to a quarantine of only eight days. The second day, however, after the arrival of the vessel, permission was obtained to land the corn, which constituted a part of the cargo. But the landing of it was delayed on account of the weather, during the thirteen following days, at the expiration of which, the government prohibited all vessels from New York, not having bills of health certified by the Spanish consul, from entering or landing their cargoes. The master then proceeded for Madeira, being the nearest port, where he landed and sold his cargo. The court said, 'There was no necessity for going from Teneriffe to Madeira. It was sailing on a different voyage from the one insured. The master went there to sell his cargo, and for the same reason he might have gone to Lisbon. It was a voluntary deviation.'⁽²⁾

(2) *Robertson v. Col. Ins. Co.* 8 Johns. 383.

The cause for which vessels most frequently go out of the regular course of the voyage, is to put into the nearest convenient port for the purpose of refitting after some disaster. The necessity of making a port to refit substitutes another track, instead of that described in the policy, and the contract applies to this new course, and the assured is obliged to pursue it directly and expeditiously, in the same manner as if the course taken from necessity had been that described in the policy, and constituted the voyage originally insured.⁽³⁾

Making a port to refit.

An insurance was made on the ship *Eyles*, 'the adventure to commence thereon from her arrival at Fort St. George, and thence to continue till the said ship should arrive at London.' On arriving at Fort St. George, the ship was found to be leaky and to require repairs, to obtain which the master, with the advice of the governor, council, commanders of ships, &c. sailed for Bengal. She was there repaired, and afterwards, on the homeward voyage, a loss happened, which the underwriters objected to paying on the ground of deviation. Lord Hardwicke thought, that if the repairs could not be made at Fort St. George,

(3) *Clark v. Unit. M. & F. Ins. Co.* 7 Mass. Rep. 365; *Guibert v. Readshaw*, Park, 454; *Neilson v. Col. Ins. Co.* 3 Caines 108; *S. C.* 1 Johns. 301; *Lavabre v. Walter*, Doug. 284.

(1) *Motteux v. Lond. Ass. Co.* 1 Atk. 545.

A ship insured against sea-risks only, is protected by the policy in seeking a port to refit.

(2) *Robinson v. Mar. Ins. Co.* 2 Johns. 89.

The cargo is loaded at Passage instead of Bayonne.

(3) *Wiggin v. Amory*, 13 Mass. Rep. 123.

(4) *Cruder v. Phil. Ins. Co.* Condry's Marsh. 207. n.; *Winthrop v. Un. Ins. Co.* Condry's Marsh. 203. n.; *Woolf v. Claggett*, 3 Esp. 257.

(5) *Goyon v. Pleasants*, Wharton's Dig. p. 330. h. t. 122.

The ship may leave her course to procure seamen.

A ship in imminent peril of capture may delay for convoy.

and Bengal was the nearest and most convenient place to obtain repairs, it was not a deviation, and said, 'he should consider it equally the same, as if she had been repaired at the very place from whence the voyage was to commence.'(1)

A question has been made whether a ship insured against only a part of the usual risks, is still protected by the policy, if she depart, through necessity, from the usual course of the voyage. A vessel insured from New Orleans to ports in the West Indies, 'against sea-risks only,' departed from the course of the voyage to put into Kingston, in Jamaica, in consequence of sea-damage, which rendered her unfit to continue on her course. Chief Justice Kent said, 'A deviation from necessity, will excuse the assured, in case of an insurance against a particular risk, as well as in the case of a general insurance.'(2) No objection was, or indeed could be made on account of this particular deviation, since the departure from the course of the voyage was made necessary by the operation of the perils insured against; the case therefore affords all the reason in excuse of the departure from the course, that can possibly be alleged in any case, however general and comprehensive the policy may be, in respect to the risks assumed by the insurers.

In the case of insurance on goods from the port of lading in France, to the United States, the vessel struck upon the bar, in coming out of the harbour of Bayonne, and it became necessary to unload her and put back to Bayonne to repair; and after the repairs were made, most of the cargo was sent by land round to Passage, whither the ship went to take it on board; and this was alleged to be a deviation. It appeared that the master acted, in respect to the loading and the time of sailing, entirely under the direction of the *pilot major* of the port, who has the entire control of ships lying at Bayonne. Mr. Justice Jackson, in giving the opinion of the court, said, 'In consequence of one of the perils insured against, it was found necessary and most for the interest of all concerned, to send part of the cargo round to Passage, to be there reladen. If so, it is the same as if the vessel had sailed from Nantes, or any other port in France, and had been driven by storms upon the bar of Bayonne. The master might then have lightened the ship, in order to carry her up to Bayonne, to make repairs, and might have unladen the cargo in the manner that circumstances should have rendered necessary or most expedient. If he acted in such case with good faith and sound discretion, there would be no deviation.'(3)

A vessel having lost part of her crew, or of which the crew is disabled by sickness, may go out of the course of the voyage to obtain seamen.(4)

A vessel may go out of the usual course of the voyage, or may delay, for the purpose of avoiding capture, or other impending peril that is insured against.(5) Upon this principle it has been decided in New York that a ship, not warranted to sail with convoy, may yet go out of its course to join convoy, for the sake of protection against the imminent peril of capture. The insurance was on goods from Surinam to New York. The

captain having cause to fear being captured by French privateers, and acting with good faith, stopped at Demerary to join an English convoy, but he was blown out to sea, and so prevented from joining the convoy, and was afterwards captured by a French privateer. The claim of a loss was objected to, on the ground that the going into Demerary was a deviation. Mr. Justice Radcliff said, 'It is no deviation to depart from the usual course of the voyage to meet with convoy, in case of real danger, or to seek the safest way home;' and Mr. Justice Kent, said, 'Was the going to Demerary to seek convoy a departure without necessity, or any reasonable cause, from the regular and usual course of the voyage. A deviation to avoid an enemy is justifiable. It is no deviation to go out of the way to avoid danger.' The inquiry in such case is, 'whether the captain acted fairly and *bona fide*, and had no other motive or view but to come the safest way home or to seek convoy.'⁽¹⁾

It was held not to be a deviation of a Danish ship, during hostilities between Denmark and Great Britain, to be put by the assured under the protection of an American frigate, as a pretended prize, for the purpose of avoiding British capture.⁽²⁾

Lord Mansfield says, 'If the master *ex justa causa* goes out of the way, as to refit, or to avoid enemies, pirates, &c. the insurance continues.'⁽³⁾

In the case of a vessel's delaying to proceed on her voyage from the port of Barcelona, Chief Justice Marshall said, 'No doubt was entertained that apprehension of danger of capture from the Algerines, if the danger was real and immediate, or the apprehension founded on reasonable evidence, would justify the continuance in the port of Barcelona.'⁽⁴⁾

A similar opinion has been given in Massachusetts in the case of a policy on goods, 'at and from Boston to Eastport.' The vessel did not sail until a month after the cargo was taken on board, and she was captured by a British ship soon after going out of Boston harbour. The reason of the delay was fear of capture, the harbour of Boston being constantly watched, at the time, by a British force; and during the delay, the master took great pains to ascertain when he might sail with the least danger. The court was of opinion, that 'the cause of delay was a justifiable one.'⁽⁵⁾

A vessel bound on a voyage from New York to Bourdeaux, sailed from New York through Long Island Sound, instead of going through the Narrows, the most usual and convenient passage, but where the vessel might have been detained by British ships of war, then lying off Sandy Hook. Mr. Justice Van Ness, in giving the opinion of the court, said, 'The ship must proceed on the voyage, in the shortest, safest, and most usual course. If the ship, without reasonable cause, leaves the customary track, the insurer is from that time discharged. But here we consider that there was a just and reasonable ground for such departure, though not an absolute necessity.'⁽⁶⁾

An English vessel bound on a voyage from London to Revel, put back on receiving news of an embargo on all English ves-

(1) Patrick v. Ludlow, 3 Johns.

Cas. 10.

(2) Gouverneur v. Unit.

Ins. Co. 1

Caines, 592.

See Lawrence v. Ocean Ins.

Co. 11 Johns.

141. See also Laing v. Glover, 5 Taunt.

49; as to the question whether sailing without convoy is a deviation.

(3) Pelly v. Roy. Ex. Ass.

Co. 1 Burr.

350.

Imminent danger of capture justifies delay in port, or going out of the course of the voyage.

(4) Oliver v. Maryl. Ins.

Co. 7 Cranch,

493.

(5) Whitney v. Haven, 13 Mass. Rep.

172.

A ship may take an unusual course to avoid capture.

(6) Reade v. Com. Ins. Co.

3 Johns. 352.

(1) *Blacken-
hagen v.
Lond. Ass.
Co. 1 Camp.*
454.

(2) *Graham
v. Com. Ins.
Co. 11 Johns.*
352.

The port of
destination
being ob-
structed by
ice, the ship
may put into
another port.

The captain
is compelled
by the crew to
change his
course.

(3) *Elton v.
Brodin, 2
Str. 1284.*

(4) *Driscoll v.
Bovill, 1 B. &
P. 313.*

(5) *Driscoll v.
Passmore, 1
B. & P. 200.*

sels in the Russian ports. Lord Ellenborough told the jury, 'that though the ship from necessity might be allowed to take a circuitous course, yet the ultimate point of destination must ever be the same; that such a necessity might perhaps even justify a return to England, if it could be proved satisfactorily, that it was the intention to seize the first favourable opportunity of returning to Revel.'⁽¹⁾

It was decided not to be a deviation, where the master, on a voyage from Carlsham to St. Petersburg, put into Revel, the passage to St. Petersburg being obstructed by ice. Chief Justice Thompson said, 'If the captain, in departing from the usual course of the voyage, acts fairly and *bona fide* according to the best of his judgment, to avoid danger, and has no other view but to conduct the ship and cargo to the port of destination, the policy still continues.'⁽²⁾

Where the master is compelled by the crew to change his course, it has been held not to be a deviation. A vessel, bound from Bristol to Newfoundland, having captured a prize, the captain ordered some of the crew to navigate the prize to Bristol, intending himself to proceed in his own vessel to Newfoundland. But the crew refused to comply with his orders, and insisted that he should go back, though he acquainted them with his orders to proceed on the voyage; and he was compelled to return to Bristol. The court and jury were of opinion that 'this was excused by the force upon the master which he could not resist,' and that it was not a deviation.⁽³⁾ The barratry of the mariners appears to have been among the risks insured against in this case; that is, the vessel was taken out of its course by a peril which the underwriters had assumed.

In the case of a ship bound on a voyage 'from Lisbon to Madeira, and thence to Saffi on the coast of Africa, and back to Lisbon,' the crew being alarmed, while at Madeira, by the reports of Moorish cruisers off Saffi, quitted the ship, and refused to return on board unless the captain would promise to sail immediately for Lisbon. The captain accordingly complied, and sailed for Lisbon, on his arriving at which place, the charterers of the ship insisted on his proceeding directly from thence to Saffi, which he did, and the ship was captured in returning from Saffi towards Lisbon. Under a policy on the ship for the entire voyage from Lisbon to the other two ports and back to Lisbon, this was held not to be a deviation. The necessity under which the captain acted, justified changing his course.⁽⁴⁾ And upon the same facts, under a policy upon the freight from Saffi to Lisbon, effected when news had been received of the vessel's being at Madeira, and before it was known that the crew had compelled the captain to return to Lisbon, a special jury found that the insurers were liable;⁽⁵⁾ of which there seems to have been little ground of doubt. This case however turned mostly on the question, whether the risk had commenced. Chief Justice Eyre said, 'That the voyage did literally commence there can be no doubt.' The insurers were liable, therefore, unless the delay occasioned by returning to Lisbon, amounted to a deviation, or

a giving over of the voyage insured; and it was held that it did not amount to either of these.

If compulsion is alleged in justification of a departure from the usual course of the voyage, such necessity must be clearly shown. The master of a vessel being ordered by the captain of a frigate, lying near him, to go out of the harbour and examine a strange sail that appeared in sight, complied with the order without any remonstrance. It was contended that, the captain of the frigate having ample means of enforcing his order, any remonstrance would have been unavailing. But Lord Ellenborough instructed the jury that 'this was a deviation.' He said, 'The master was not proved to have acted under any duress or compulsion. If a degree of force was exercised, which either physically he could not resist, or morally, as a good subject, he ought not to have resisted, the deviation was justified. But if he chose to go out with the hope of making prize, he could not thereby extend the risk of the underwriters.'⁽¹⁾

To authorize a departure from the usual course of the voyage, the necessity must be clearly shown.

(1) *Phelps v. Auldjo*, 2 Camp. 350.

It has been held that the master may go out of the usual course of the voyage, to procure intelligence and advice, when any extraordinary circumstances make it very difficult to determine in what manner to proceed. The master of a vessel bound from Boston to Rotterdam, having notice on the voyage that, by the British orders in council, Rotterdam was placed under the same restrictions in respect to trade, as if it had been actually blockaded, put into Plymouth, in England, for intelligence and advice. Chief Justice Parsons said, in giving the opinion of the court, 'As this was done for good cause, and for the purpose of procuring intelligence and advice, his proceeding was no deviation.'⁽²⁾

The master may go out of his course in an extraordinary case, for intelligence and advice.

(2) *Lee v. Gray*, 7 Mass. Rep. 349.

A ship chartered for a voyage from London to Norfolk, in Virginia, there to take a cargo of lumber for London, being insured from London to her loading port in Virginia, and back to London, arrived at Norfolk with a cargo of salt in January, 1808, where an embargo was laid on vessels, and not taken off until March, 1809. The ship might have left Norfolk immediately, it seems, with her outward cargo of salt, or in ballast, but the master staid until the embargo was taken off, and long enough afterwards to take on board a cargo of lumber, with which he sailed in August, 1809. It was held that waiting until the embargo was taken off, and for the purpose of taking on board a cargo of lumber, was not a deviation.⁽³⁾

A vessel stays in port more than a year till she can take on board a return cargo.

(3) *Schroder v. Thompson*, 1 Moore, 163. 7 Taunt. 462.

A ship insured 'at and from Pillau to London,' needed repairs before being able to take in her cargo at Pillau, and delayed there for the purpose of making the repairs. After being ready for sea, she was prevented from proceeding, for some time, by the lowness of the water, on account of which she could not pass over the bar. It was objected that this delay was a deviation. Lord Kenyon instructed the jury, that 'If there was any voluntary delay,' it would discharge the underwriters; but he said it was 'not necessary that the vessel should be seaworthy at the time' when the risk commenced, from which he inferred

The ship may delay for repairs at the port where the risk commences.

(1) *Smith v. Surridge*, 4 Esp. 25.

The ship delays at the port of destination with the expectation of being admitted to entry.

that a sufficient time might be taken for making the requisite repairs.(1)

In a case of insurance to the port of St. Jago, in Cuba, the vessel, on arriving there, was not admitted to entry, though not refused so absolutely that the master had not some hope of obtaining permission to enter. For the purpose of obtaining such permission he delayed there twenty-three days, and then sailed for another port, on the course to which a loss took place. Mr. Justice Kent, in giving the opinion of the court, said, 'The delay at St. Jago cannot be considered as amounting to a deviation, because it does not appear to be unreasonable or wilful. It was created by a probable expectation of permission to enter.'

(2) *Suydam v. Mar. Ins. Co.*
2 Johns. 143.

ter.?(2)

If the vessel enters a port to dispose of the cargo, the master may stay there a reasonable time for this purpose although he meets with no success. A vessel put into Barracoa for this purpose, and remained there more than four months, during which time the supercargo made unsuccessful endeavours to effect a sale of the cargo. Yet the court said, 'they could not intend any unreasonable delay or negligence on the part of the assured;' and held it not to be a deviation.(3) But it would evidently depend upon the circumstances of the particular case, whether a delay for any certain time would amount to a deviation.

(3) *Gilfert v. Hallet*, 2 Johns. Cas. 296.

Delay for the purpose of succouring the distressed.

Delay or going out of the course to succour those who are in distress, has been held not to be a deviation. This justification of a departure from the usual course of the risk, though always mentioned by elementary writers, has not been often recognised by courts, for the reason that a justification resulting so directly from the plainest principles of humanity, and in the sufficiency of which the assured and insurers are in general so much interested, has never been directly called in question. Mr. Justice Lawrence says, 'As to deviations for the purpose of succouring ships at sea in distress, it is for the common advantage of all persons, underwriters and others, to give and receive assistance to and from each other in distress.'(4) Chief Justice Marshall intimates that stopping to relieve a vessel in distress is not a deviation.(5) Mr. Justice Washington says, 'If the object of the deviation be to save the life of man, he will not be the first judge to exclude such a case from the exceptions to the general rule. The humanity of the motive, and the morality of the act, give it a strong claim to indulgence.'(6)

(4) *Lawrence v. Sydebotham*, 6 East, 54.
(5) 2 Cranch, 258. n.

(6) *Bond v. Brig Cora, Condys*
Marsh. 211. n.

Delay, or going out of the course to save property.

But it seems that delay, or the going out of the course, to save property, is a deviation. Mr. Justice Washington says, 'If the stoppage be continued, or the risk increased, by adding to the cargo, or diminishing the crew, or by other means, for the purpose of saving the property found, I think the underwriters are discharged.'(7) The same is implied by Chief Justice Marshall, in giving the opinion of the court, where, speaking of the salvage to be allowed to the owners of a vessel which had saved another vessel and cargo, he says, 'The same rewards ought to be extended to all, for a service designed to be encouraged; and it is

(7) *Ibid.*

surely no reward to a man, *made his own insurer* without his consent, to return him very little more than the premium he had advanced. (1)

(1) *Mason v. Ship Blaireau*, 2 Cranch, 268.

In case of the cargo's being seized, the master may delay in port, for the purpose of claiming it, if there be any reasonable hope of succeeding in the claim. A ship entered the port of Vera Cruz on the 14th of July, where she discharged her outward cargo, which was seized by the officers of the government on the ground of its having been illegally imported. The master remained there until the middle of December, for the purpose of obtaining a restoration of the cargo. Mr. Justice Sewall, giving the opinion of the court, said, 'The captain swears that the occasion of his stay was the seizure of the cargo. With his owners and all interested in the cargo, the hope of recovering it, and the advantage of the captain's agency in soliciting their claim, would sufficiently justify his stay.' (2)

The master may delay in port for the purpose of claiming the cargo.

(2) *Stocker v. Harris*, 3 Mass. Rep. 409.

It appears from the preceding cases, that if the vessel departs from the course of the voyage, or delays, the departure or delay must be limited by the purposes for which liberty is given in this respect in the policy, or on account of which the departure or delay takes place. If the vessel has express liberty to stop for intelligence, she must stay only a sufficient time to obtain it. If she delays from a fear of capture, she must wait only as long as the ground of the fear continues; and if she departs from the course to refit, she must proceed again on the voyage, as soon as she can be refitted. 'Unquestionably an idle waste of time, after a vessel has completed the purposes for which she entered a port,' is a deviation. (3)

A departure from the course, or delay, must be limited by its purpose.

(3) 7 Cranch, 490.

If the vessel is in a port for the purpose of obtaining a cargo, 'she may remain as long as is necessary to complete her cargo, but it is scarcely to be supposed that this is to be regulated by any usage or custom. The usages and customs of any port or trade are peculiar to the port or trade, but the necessity of waiting where a cargo is to be taken on board, till it can be obtained, is common to all ports and trades. The length of time frequently employed in selling one cargo and procuring another, may assist in proving that a particular vessel has, or has not, practised unnecessary delays in port, but can establish no usage by which the time of remaining in port is fixed.' (4)

(4) *Oliver v. Maryl. Ins. Co.* 7 Cranch, 490.

It has already appeared that a general liberty of touching at a port, or ports, can be used only for purposes connected with the voyage. In case of insurance from Heligoland to Memel, with liberty to touch at all places, Le Blanc, J. said, 'If the master had gone into Gothenburg, merely for orders, whether he was to go ultimately to Anholt or Memel, it would have been a deviation;' (5) for the calling to know whether he should proceed to the port to which he was insured, or to some other, cannot be for the purpose of expediting the voyage to the original port of destination.

(5) 1 M. & S. 51.

If the policy gives a general liberty to touch at a place, the purpose for which the leave is given will be determined by the other provisions of the policy, and the nature of the voyage.

The object of a general liberty to touch at a

port, is determined by other parts of the policy, or the nature of the voyage.

(1) *Metcalf v. Parry*, 4 Camp. 123.

Whether liberty to touch involves that of trading.

(2) *Stitt v. Wardell*, Park, 438; 2 Esp. 610.
(3) *Taunt*, 456.

(4) *Sheriff v. Potts*, 5 Esp. 96.

A ship takes in a cargo at a port to which she is driven by a storm.

A ship was insured 'from Antigua to England, with liberty to touch at all the West India Islands, Jamaica included,' without specifying the purposes for which she might touch. She stopped at St. Kitt's to take a part of her cargo. It was objected that the policy did not authorize this. Chief Justice Gibbs said, 'Does not the whole scope of the adventure, as described in the policy, show that the ship was to go about from island to island, if necessary, for the purpose of seeking freight? What could be the object of the liberty given her to touch at Jamaica, if she could not stay there to take in goods? Was she to go 500 miles out of her way for the mere pleasure of viewing that island, and asking for the news?'(1)

A question has been made whether liberty to touch at a port involves that of staying or trading. This seems to be answered by the principles and cases already stated; by which it appears that the master must keep in view the purpose for which the policy gives the liberty, and also the expedition and furtherance of the adventure; but whatever he does besides, whether he trades, or unloads and reloads his cargo; if the risks insured against, are not thereby affected, the underwriters have no ground of exception. This is the general inference authorized by the cases on this particular subject, although some of them seem to favour a different doctrine.

A policy was made upon goods, for a voyage from Whitehaven to St. Michael's, with liberty 'to touch and stay at any place or places whatsoever.' The ship was driven into Dublin by stress of weather, where she unloaded a considerable part of her cargo, consisting of coals. Lord Kenyon instructed the jury, 'that the unloading and selling the coals, though the ship was not delayed thereby,' was a deviation; and he said, in answer to a question of the counsel, that the construction would have been the same in respect to a port where the vessel had express liberty to touch.(2) But Sir James Mansfield says, 'this was a sudden answer to a sudden question; I wish his lordship had more fully considered it.'(3)

Under a policy containing 'liberty to touch and discharge goods at Lisbon;' goods were discharged at Lisbon, and another cargo was taken on board there; but without any delay for this purpose. Lord Ellenborough said, 'This is certainly a deviation.'(4) But these two cases have been over-ruled.(a)

A case decided in the time of Lord Mansfield, although not on a policy containing this liberty, yet seems to be applicable, since the same rules must govern the conduct of the master, whether he touch at a port under a liberty given by the policy, or from necessity. The policy was on a vessel, 'at and from St. Kitt's to London, warranted to sail with convoy.' After be-

(a) By *Raine v. Bell*, 9 East, 195, as Lord Ellenborough said in *Laroche v. Oswin*, 12 East, 131. In giving his opinion, in *Raine v. Bell*, he said, 'This case stands on its own ground.' But in *Laroche v. Oswin*, he said, *Stitt v. Wardell*, and *Sheriff v. Potts*, had been over-ruled in *Raine v. Bell*.

ing partly loaded she was driven by a storm out of St. Kitt's to St. Eustatia, where, after making an unsuccessful attempt to return to St. Kitt's, she took on board the remainder of her cargo, and waited for the convoy. Lord Mansfield, and Justices Ashurst and Buller, held that the taking in the remainder of the cargo at St. Eustatia was not a deviation, on the ground that the vessel attempted to get back to St. Kitt's, and also that no time was lost. Mr. Justice Willes doubted, being inclined to the opinion that she should have proceeded directly towards London without waiting for convoy. The circumstance that the vessel took a different cargo from that intended to have been taken at St. Kitt's, had also some weight with him.(1) Though Justice Willes did not agree with the other judges as to the deviation in this particular case, yet all the judges agreed in the general doctrine, that the trading was not a deviation, if there was no delay for the purpose, and the risks insured against had not been changed.

(1) *Delaney v. Stoddart*, 1 T. R. 22. See also *Gilbert v. Redshaw*, Marsh. 206.

In a case decided in Pennsylvania, a vessel detained by an embargo, unloaded and sold a part of her cargo, and it was held that, if this was done while the vessel was necessarily detained, it was not a deviation.(2)

A ship detained by an embargo, unloads and reloads.

In an action on a policy upon ship and freight, 'from the coast of Spain to London, with liberty to touch and stay at any port or place whatsoever,' it appeared that the ship was compelled to put into Gibraltar to obtain provisions, and while she was there for that purpose, and without occasioning any greater delay, the captain took in some chests of dollars on freight. On the authority, mostly of *Stitt v. Wardell*, cited above, this was alleged to be a deviation. Lord Ellenborough said, 'If the taking in the dollars materially varied the risk of the underwriters, they would be discharged by it; but it did not vary the risk by occasioning any delay. I have turned in my mind whether the risk might have been increased by the particular kind of cargo, namely treasure; if it were known to an enemy, it might hold out an additional temptation to seek for, and attack the ship. But I do not know that a mere temptation of this sort has ever been held a sufficient ground to avoid a policy, if the original act itself were lawful.' Mr. Justice Lawrence said, 'If Gibraltar had continued a port of Spain, there is no doubt but that the dollars might have been taken on board without violating the policy.' And it was adjudged not to be a deviation.(3)

Dollars are taken on board at a port where the ship touches.

(2) *Kingston v. Girard*, 4 Dal. 274. S. C. *Condy's* Marsh. 189. n.

In a case decided in New York on a policy upon a vessel, and one upon the cargo, the vessel was compelled by stress of weather to put into St. Croix, and during her necessary detention for repairs the supercargo sold a very considerable part of the cargo. This was alleged to be a deviation. Mr. Justice Thompson, giving the opinion of the court, asked—'What injury could the sale occasion to the underwriters, provided it occasioned no delay?'(4)

(3) *Raine v. Bell*, 9 East, 195.

The cargo is sold while the ship stops for repairs.

(4) *Kane v. Col. Ins. Co.* 2 Johns. 264.

A similar opinion was given respecting a policy on a vessel from Stockholm to New York. Some sheep were taken on board at Stockholm, but the person having the care of them,

While the ship stops, provender is taken in for

sheep which
are carried in
the vessel.

understanding that the vessel was to stop at Elsineur, did not take in a sufficient quantity of provender at Stockholm; he took some more on board at Elsineur, while the vessel was stopping to pay the *Sound dues*, and without occasioning any delay. This was objected to by the underwriters. Lord Ellenborough said, that, 'Not taking sufficient provender for the sheep is not like neglecting to take a sufficient crew, or tackling, or other necessary, relating to the equipment or navigation of the ship.' And as no delay had been occasioned, he thought the case came within that of *Raine v. Bell*, above cited. Mr. Justice Bayley said, it did not follow that the master would have gone elsewhere for provender, if there had been none at Elsineur. He might have thrown the sheep overboard.(1)

(1) *Cermack v. Gladstone*, 11 East, 347.

(2) *Laroche v. Oswin*, 12 East, 131.

The vessel is
used as a
factory ship on
the coast of
Africa.

In a case of insurance on goods, on board of a vessel under convoy; just before the convoy made signal to sail, some goods were taken on board from a boat that came alongside. Lord Ellenborough said, 'The risk was not enhanced or varied,' by taking the goods on board, and accordingly it was not a deviation.(2)

A vessel insured, 'at and from the coast of Africa, to the West Indies, with liberty to exchange goods and slaves,' remained on the coast, from August to March, employed as a *factory ship*, that is, in receiving slaves for others, to be put on board of other ships; it did not, however, appear that any slaves, the proceeds of her own cargo, had been received on board, and then put on board of other ships; but her stay there was several months beyond the usual stay of ships in that trade; though it is not stated that any delay was occasioned by this employment of the vessel, unless this is implied in the opinion of the judge. It however appeared that factory ships are commonly thatched, which it seems this one was not. Lord Mansfield said, 'The single point here, is, whether there has not been what is equivalent to a deviation; whether the risk has not been varied? It is not material whether or not the risk has been greater. If a ship is turned into a floating warehouse or *factory-ship*, the risk is different; it varies the stay; for while she is used as a warehouse no cargo is bought for her.' And the court seemed to be of opinion that this was a deviation.(3)

(3) *Hartley v. Buggin*, Park, 468. See also *Tennant v. Henderson*, 1 Dow, 334.

Under a liberty
to take in
stock, the ves-
sel takes on
board bul-
locks and
asses.

In the case of an insurance from New York, to the coast of Africa, 'with liberty to touch at the Cape de Verd Islands for stock, and to take in water;' the vessel touched at Fuego, one of these islands, where she stayed seventeen days, during which time the master started a part of the cargo, and opened two bales, for the purpose of taking out a part of the goods, and took on board four bullocks and four asses, besides provisions and water. The usual time of staying at the Cape de Verds, for taking in stock and water, is two or three days, except when the weather is unfavourable, which it appeared not to have been in this case. The taking in the bullocks and asses was objected to, as a deviation. It is not expressly stated in the case that this occasioned any delay, but this was alleged by the counsel for the underwriters, and it was insisted also that they encum-

bered the deck, and thus obstructed the navigation of the vessel, more than the small stock usually taken in at those islands would have done; but the finding of the jury negatived this part of the defence. The opinion of the court was given by Mr. Justice Johnson, who said, 'The question is, in what sense the term *stock*, was used; and construing the license according to the subject matter, it could mean no more than permission to provision the vessel with live stock, such as is usual on a voyage.' And it was adjudged to be a deviation.(a)

A vessel and the freight were insured on a voyage, 'from Teneriffe to Havana, and at and from thence to New York, with liberty to stop at Matanzas.' The vessel stopped at Matanzas to avoid British cruisers, then cruising between that port and Havana, and as soon as the passage was safe, she proceeded to Havana. She was afterwards lost between that place and New York. While the vessel was staying at Matanzas, the cargo was unloaded, but without causing any delay. This was relied upon as a deviation. Chief Justice Marshall, in giving the opinion of the court, said, 'Why is it a deviation? It produced no delay, no increase of risk, and did not alter the voyage. Nothing can be found in this transaction, which in reason, ought to discharge the underwriters.'(1)

The cargo is unloaded while the vessel delays for fear of capture.

Goods being insured on a voyage 'from Plymouth to Malta, with liberty to touch at Penzance for any purpose whatever;' the vessel took a part of her cargo at Plymouth, and the rest at Penzance, and was afterwards stranded in the course of the voyage. In behalf of the underwriters it was contended that the taking in goods at Penzance, was a deviation. But the court held, that 'there was no ground for the objection,' and thought the case not worth being brought up for argument.(2)

(1) *Hughes v. Union Ins. Co.* 3 Wheat. 159.

Under a liberty to touch for any purpose, the vessel takes in a part of her cargo.

(2) *Violett v. Allnutt*, 3 Taunt. 419.

(a) *Maryl. Ins. Co. v. Le Roy*, 7 Cr. 26. The counsel for the underwriters grounded their defence, among other things, on a supposed increase or change of the risk, but Mr. Justice Johnson, in giving the opinion of the court, did not seem to think this essential to a deviation. He says, 'The discharge of the underwriters depends not upon any supposed increase of risk, but wholly on the departure of the assured from the contract. The consequences of such violation are immaterial to its legal effect, as it is *per se* a discharge of the underwriters.' If by this is meant, that, where under the liberty to touch for a particular purpose, the master attends to other things during the necessary stay for that purpose, it is a deviation, though the risk is not varied thereby; the opinion is plainly inconsistent with all the preceding cases, excepting *Stitt v. Wardell*, and *Sheriff v. Potts*, the latter of which Judge Johnson seems to suppose to be law, and adduces as authority; though Lord Ellenborough, upon whose opinion it was decided, subsequently considered that it had been overruled. In a subsequent case, Chief Justice Marshall, speaking of this case of the *Maryl. Ins. Co. v. Le Roy*, says, 'The assured traded, and the delay was considerable and unnecessary; the risk, if not increased, might be, and certainly was, varied.' *Hughes v. Un. Ins. Co.* 3 Wheat. 166.

Under liberty to touch, the vessel stops to take in goods.

Sir J. Mansfield says, 'It is doubtful, nor can he find it any where defined, what is the precise meaning of *liberty to touch*, as contradistinguished from *liberty to touch and stay*. The time of staying in both instances is perfectly undefined; and no case decides how long, or for what purposes, a ship may stay under these clauses.' But where the policy gave 'liberty to touch at the Cape de Verd Islands, without expressing for what purpose, and at the time of subscribing the policy, the assured communicated to the agent who subscribed for the underwriter, that the object of touching there was to take in salt, it was held that stopping there for that purpose, and staying to take the salt on board, was not a deviation.(1) This case, as well as some of the preceding, illustrates the general proposition already laid down, that where the policy does not specify the object of the liberty to touch, it must be inferred from the other provisions of the policy, the nature of the voyage, and perhaps also the representations of the assured, as far as they are consistent with the express provisions of the policy.

(1) *Unquhart v. Barnard*, 1 Taunt. 450.

The taking of a letter of marque is not, in itself, a deviation.

The mere taking of a letter of marque, without the consent of the underwriters, has been held in one case to be a deviation. The voyage was from Liverpool to Oporto. Lord Kenyon said, 'It has been urged that this letter of marque was not really acted upon, but was taken merely for the purpose of being used on the homeward voyage. What the intention of the assured might be, I cannot pretend to say; but it appears that the letter of marque was a general one, extending as well to the voyage out, as to that home. And though it is urged that it was never acted upon, and that the ship did not in fact deviate for the purpose of cruising; it is enough for me to say that the captain had a strong temptation to deviate; and that is such an essential alteration of the circumstances, from the condition of the vessel at the time of the insurance, as ought to discharge the underwriters. Gross, J. said, 'The risk of a mere trading ship is different from that of one carrying letters of marque.'(2) In a subsequent case, Lord Kenyon said, 'He understood that this decision had been doubted, though on a review he did not know that it had been improperly decided;' he however said, it 'was decided on principles that were new, and which went to the extreme verge.'(3) It does not appear from the case, nor from the opinions of the judges, in what respect the risks were varied by taking the letter of marque; and as Mr. Marshall remarks, upon this case,(4) if an *intention* to deviate is not a deviation, still less is a mere *temptation*. The underwriters, it is true, expressly refused to give their assent to it, but this only made the case the same as if they had not been consulted on the subject.

(2) *Denison v. Modigliani*, 5 T. R. 580.

(3) 6 T. R. 382.

(4) p. 282. b. 1. c. 7. s. 6.

In a subsequent case of a policy on goods, from the Bahama Islands to Liverpool, the assured not being able to procure seamen, in consequence of a notion prevailing among them that the enemy had threatened to treat as pirates, the crews of every vessel that made any resistance without having letters of marque, it being known that the vessel had guns on board for the purpose of defence, procured a letter of marque, to quiet their ap-

prehensions, and induce them to ship. There was no intention of using the commission for the purpose of cruising or making reprisals; and the captain was instructed not to cruise. No certificate of clearance, such as was required by law, to authorize cruising, was taken out for the vessel. The captain, however, cruised, and in so doing, committed an act of barratry. It was held that the taking the letter of marque was not a deviation, but the judges distinguished this case from the preceding, by the circumstance that the letter of marque was not a legal commission for cruising.⁽¹⁾

The question whether taking a letter of marque is, in itself, a deviation, has come before the Supreme Court of Massachusetts. Mr. Justice Jackson, giving the opinion of the court, said, 'The authority of *Dennison v. Modigliani*, has been very much shaken; and if the question were now new, it would be difficult to support that decision, upon the reasons there given, or upon any other that had been suggested in the argument,' in the case then before the court. And the court accordingly were of opinion, that the taking a letter of marque was not, in itself, a deviation.⁽²⁾ Chief Justice Parker, afterwards, speaking of the last case, in giving the opinion of the court, says, 'It was decided in *Wiggin v. Amory*, that the mere fact of taking a commission as a letter of marque, without the knowledge or consent of the underwriter, had no effect upon the policy, the court not admitting the doctrine that a temptation to deviate avoided the contract, as was laid down in *Dennison v. Modigliani*.'⁽³⁾

It accordingly appears that the mere fact of the vessel's taking a letter of marque, without any express liberty for this purpose, is not, of itself, a deviation. But if a commission of letter of marque be taken without the consent of the underwriters, or if leave be given to take it in the policy, without any provision in regard to the use which may be made of it, the ship is authorized to use it only for purposes of defence.

Cruising, for ever so short a time, without any liberty being given in the policy, was long ago held by Lord Camden to be a deviation, and was so considered by a special jury of merchants.⁽⁴⁾

A ship was insured with a warranty that she should be armed, but without any liberty to cruise, or any mention of a commission of letter of marque in the policy. In the course of the voyage she gave chase to an enemy, that hove in sight, and after a chase of seven hours, during which she once lost sight of the enemy, the two ships had an engagement. It was agreed on all hands that under these circumstances, the ship was not authorized to cruise; but several witnesses said, that, according to the usage, vessels carrying letters of marque, might chase an enemy that hove in sight. It was admitted on the part of the insurers that if an enemy came in the way, the ship must defend herself; but contended, that if the letter of marque lost sight of the enemy, that was no longer chasing, but cruising. Lord Mansfield left it wholly to the jury, on the ground that it

(1) *Moss v. Byrom*, 6 T. R. 379.

(2) *Wiggin v. Amory*, 13 Mass. Rep. 125.

(3) *Wiggin v. Boardman*, 14 Mass. Rep. 14.

A letter of marque must be used only for defence, unless the policy authorizes a different use of it.

(4) *Cock v. Townson*, Park, 448.

(1) *Jolly v. Walker*, Park, 448; *Syers v. Bridge*, Doug. 527.

was a question of the usage and common understanding in such cases. The jury found that it was not a deviation.(1)

In another case a witness stated the practice to be according to this finding. The question was put upon the same ground of usage, in a subsequent case, on a policy upon a ship from Liverpool to the coast of Africa, and thence to the West Indies, 'with or without letter of marque.' While on the coast of Africa, and without going out of the way, she took a prize, which she sent into Liverpool. Soon after, while pursuing her course, she saw a Spaniard to leeward, whereupon *she altered her course about a quarter of a point, and pursued the Spaniard about a quarter of an hour*, when she abandoned the chase, and continued her voyage, in the course of which she was afterwards wrecked. Lord Ellenborough said, in giving the opinion of the court, 'It was contended on the part of the assured, that these words authorized the ship to chase vessels descried in the course of the voyage at whatever distance, for an indefinite period of time, in whatever direction; and on that of the insurers, that the policy having designated a mere commercial adventure, the liberty of taking a letter of marque must be construed with reference to such adventure, incorporating therewith such hostile risks as might arise from the use of the letter of marque, for purposes originally and ultimately of a defensive nature. In the absence of any determination on the effect of such words, and where the words are susceptible of different meanings, it may be material to ascertain, as a question of fact, in what manner parties have acted upon them in former instances, and whether they have obtained, in use and practice, any known and definite import.'(2)

(2) *Parr v. Anderson*, 6 East, 202.
(3) Park, 450.

Accordingly, the case was brought before a special jury who found it to be a deviation;(3) which agreed with the instruction given by the judge on the original trial, namely, 'that if the jury believed the changing the course was for the purpose of hostile capture, he thought the mere liberty to carry a letter of marque, without more, would not justify it;' but that it would be justifiable if it was a defensive measure.(4)

(4) 6 East, 203.

Insurance was made upon goods on board of the ship *Volant*, from France to the United States. The *Volant* took a commission of letter of marque at Bayonne, without any leave for this purpose in the policy, and in the course of the voyage, recaptured the *Criterion*, an American vessel, that had been captured by the British. The time taken in making the capture, and putting a prize crew on board, was between two and three hours. 'In making the capture the *Volant* did not chase the prize; nor was there any departure from her course, nor delay of her voyage, except what was occasioned by taking possession of the prize, and exchanging the men.' There was testimony tending to show that the *Volant* at first attempted to escape from the *Criterion*, from an apprehension of her being of superior force, or from a desire of avoiding an engagement. The prize was sent into a French port.

Mr. Justice Jackson, giving the opinion of the court, said, 'Although the taking the commission may not vitiate the policy, yet the using of it for the profit of the owners, and the taking of a prize, is a deviation. It can make no difference whether the ship goes out of her course to seek the prize, or only abandons her course to make the capture after seeing the prize; whether this abandonment be by altering her course, or by laying to; or whether the time devoted to this object be one hour or one month. If the line is not drawn here, it will be impossible to say to what extent a ship, under such circumstances, may depart from the regular course of her voyage; and the underwriter upon a common mercantile voyage will be exposed to hazards as great, as when he expressly agrees that the ship may take a commission and make captures.'

'There is no doubt that the *Volant*, whether she had a letter of marque or not, might have beaten off any ship that should have attacked her, without prejudice to this insurance. This would have been necessary to have accomplished the objects of the voyage. But in the present case this object was fully answered as soon as it was ascertained that the strange ship was not strong enough to take the *Volant*, or that she would not attempt it. All that was done by the master afterwards, was not for the purpose of prosecuting the voyage with more safety and despatch, but with a view to another and distinct object; with a design to acquire gain as a privateer or cruiser, and to derive a profit from her commission and guns, instead of using them merely to defend the ship, and advance the voyage insured.'

(1) *Wiggin v. Amory*, 13 Mass. Rep. 127. See also *Wiggin v. Amory*, 14 Mass. Rep. 1.

In a subsequent case upon a policy on goods in the *Volant*, for the same voyage, comprising the same facts, with the additional fact that the underwriter knew of the vessel's having a letter of marque, Chief Justice Parker gave a similar opinion of the court. He said, 'After some doubt, we are all of opinion that the knowledge that a vessel is armed, and has a commission, does not necessarily carry with it an assent that her commission shall be used except for defence. It may be that she is armed only for the purpose of defence, and that her commission is to be used only to justify the attack of such vessels as may come in her way; and possibly the capture of such vessels, if that can be done without delaying the voyage. The knowledge of such armament and commission cannot amount to an assent that any deviation from, or delay of, the voyage, should take place in consequence of the new character of the vessel.' Upon this construction, and also upon the principle that parol evidence cannot be admitted to vary the terms or change the effect of a written instrument, the court held that the stopping to make the capture was a deviation.(2)

(2) *Wiggin v. Boardman*, 14 Mass. Rep. 12.

It is to be kept in mind that the principles and reasons stated by the judges in these cases, proceed upon a construction of the testimony, that is, upon a supposed fact, that the master of the *Volant* had, in making the capture, done acts which could not be referred to motives of defence. In a suit commenced by one of the shippers by the *Volant*, for the same voyage, against

the owners of the vessel, for the misconduct of the master in stopping to make the capture, and thereby defeating the insurance on the goods, testimony was introduced to show, and it was urged in argument, that the *Criterion*, had she not been captured and sent into port by the *Volant*, might have given information to British cruisers, that would have induced them to pursue and capture the *Volant*. The agent of the shipper at Bayonne, approved of the vessel's taking the letter of marque. In this case the jury were of opinion, in compliance with the instructions of Chief Justice Parker, that the stopping to make the capture did not render the owners of the ship liable in damages to the owners of the cargo.⁽¹⁾

(1) *Gray v. Thorndike and others.*
Sup. Jud.
Court. Mass.
Suff. Nov.
1817.

In a subsequent case upon a policy on a part of the *Volant's* cargo, for the same voyage, the jury were of opinion that the master was actuated by the purpose of self-defence in capturing, and sending the prize into port. The principles laid down by Mr. Justice Story, in his instructions to the jury, agree substantially with those just recited. He, however, gives the captain a greater discretion, and puts a larger construction upon the acts that he may do in defence of his vessel. He said, 'Whether a vessel be commissioned or not, she has a right to repel any attempt of an enemy, and to protect and defend herself by all reasonable precautions against a meditated hostile attack. If a vessel, supposed to be an enemy cruiser, be in sight, and apparently intend an attack upon a merchant vessel, the master of the latter is bound to exercise his best skill and judgment as to the time and mode of his defence, and if he act honestly and fairly, he will be justified, whatever may be the event. He is not bound to make his escape in the first instance, and on failure of this to meet the enemy. He may lay to, or chase the enemy, if he deem that the most effectual way to secure his object. The only question, in cases of this nature, is, whether what is done is fairly attributable to a mere intention of self-defence, or to motives of another nature—such as a desire of profit—if the latter, then it is a deviation.' In regard to taking possession of a prize, he said, 'If the capture was made in self-defence, the master had a right to take possession of his prize, and if, without injuriously weakening his own crew, he could man the prize, he had a right so to do, and the delay for this purpose was not a deviation. He had a right to make the capture effectual to prevent the enemy from recommencing the attack, or giving information to other cruisers. The right of capture drew after it all the other incidents. It would be most mischievous to the interests of trade, to discourage men from making a gallant defence, by the knowledge that in no event could they reap a reward for the victory.'⁽²⁾

(2) *Haven v. Holland*, 2
Mason's Rep.

Insurance was made upon a ship for a voyage from Liverpool to the coast of Africa, and thence to the West Indies, 'with or without letters of marque, with leave to chase, capture and man prizes.' She captured a vessel on the coast of Africa, whence she proceeded, with her prize in company, towards the West Indies. During the voyage she several times *shortened*

sail, and lay to, in order to give the prize time to come up with her. She afterwards foundered at sea and was lost.

Lord Ellenborough said, 'The question is, whether *acting as convoy* to a prize, and slackening sail for this purpose, be within the meaning of *leave to chase, capture, and man prizes*,' and he was of opinion that it was not, upon the principle that *expressio unius est exclusio alterius*. Grose, J. said, 'It is the case of a ship wilfully loitering, and not using that despatch to arrive at her port of destination, that she might have done.' It was accordingly considered to be a deviation. The assured contended that, as the policy gave leave to take a letter of marque, it authorized the captain to act according to the authority and direction given in such letter, and in this case the commission authorized the captain, among other things, '*to bring his prizes to such port as should be convenient*.' But the judges said, 'This did not mean the actual bringing of them in by the master himself; causing them to be brought in, by putting a competent number of men on board for that purpose, would fully satisfy those words.'⁽¹⁾

(1) *Lawrence v. Sydebotham*, 6 East, 45.

But under a policy giving liberty to cruise and make captures, the convoying of prizes captured is not a deviation, unless the vessel delay or go out of the course of the voyage for that purpose. Under a 'liberty to cruise and capture,' the ship convoyed two prizes off the coast of Sumatra, eight or ten days. The jury found that the risk was not thereby increased, and Chief Justice Parker, in giving the opinion of the court, said, it did not appear that the ship went out of the way, or was delayed for this purpose. It was accordingly held not to be a deviation.⁽²⁾

Convoying prizes is not a deviation if the ship does not go off her course, or delay, for this purpose.

(2) *Ward v. Wood*, 13 Mass. Rep. 539.

It appears from the preceding cases that a vessel insured, with leave to take a letter of marque, but without any liberty to cruise and convoy prizes, can act under its commission only on the defensive; and also that a vessel may, without any express liberty for that purpose, take a commission of letter of marque, to be used in the same manner.

Insurance being made on a vessel from Liverpool to Antigua, 'with liberty to cruise six weeks,' she cruised five weeks at one time; then pursued her voyage a few days; then cruised again for five days, and was captured. Lord Mansfield thought, 'the subject matter was decisive to show that the six weeks meant one continued period of time;' and accordingly that the cruising at different times was a deviation.⁽³⁾

Liberty to cruise six weeks.

(3) *Syers v. Bridge*, Doug. 527.

A ship was insured for a voyage 'from London to the Southern Whale and Seal Fishery, and back, with liberty to touch, and stay, and trade at all ports; with or without letters of marque; and with liberty to chase, capture, and man prizes, and to take, and return with, or send into port, prizes; and also to cruise thirty-one days, together or separate, on this side of Cape Horn.' The ship being off the port of St. Blas, in California, and so not within the limits of the liberty to cruise thirty-one days, waited nine days for a vessel of the enemy to come out, which came out at the end of that time, and

The general liberty to cruise restrained by a particular clause.

(1) *Hibbert v. Haliday*, 2 Taunt. 428.

Liberty to see prizes into port does not authorize delaying while they are repairing.

(2) *Jarratt v. Ward*, 1 Camp. 263.

It is not a deviation to go out of the course on account of a peril insured against.

(3) *Vallejo v. Wheeler*, Cowp. 143; *M'Intire v. Bowne*, 1 Johns. 229.

(4) *O'Reilly v. Gonne*, 4 Camp. 249.

Whether it is a deviation to go out of the course on account of a peril not insured against.

was captured. While the vessel insured was so waiting, she was upon fishing ground, but not upon the best fishing ground. This was held to be a deviation. The waiting for the prize to come out, was equivalent to cruising, and the general liberty for cruising was restrained by the particular clause.(1)

In a case of insurance for a similar voyage, with 'liberty to cruise for, chase, capture, man, and see into port, any ships of the enemy;' the captain having taken a prize, went with it into St. Catharine's; where he staid a month to repair the prize, which he sent to Europe. The prize could not have been refitted without this delay. Lord Ellenborough instructed the jury, that 'the leave given would have authorized the ship to accompany prizes to any convenient port, consistent with the main adventure. She might have entered the port with them, and seen them safely moored, and perhaps stopped a reasonable time to give directions for their proceeding on their final destination; but could not justify the ship in waiting till the prize was repaired.'(2)

There can be no question that the liability of the underwriters continues, after a departure from the usual course, occasioned by the operation of a peril insured against, or for the purpose of avoiding a peril of this description. If barratry be a peril insured against, and the master barratrously depart from the usual course of the voyage, the insurers are still liable for any subsequent loss by capture, or other perils insured against in the policy.(3)

Freight was insured against detention and capture, among other perils, 'at and from Lagaira, to ports on the Spanish Maine, and to ports in the North Sea.' In order to avoid being seized by the Royalists, at Lagaira, the ship was obliged to cut her cable and proceed to sea when she was not properly fitted to perform the voyage. In consequence of sailing without a suitable preparation, she could not proceed upon the voyage, and was obliged to put into Jaquemel, which was out of the course of the voyage. Chief Justice Gibbs said, 'The ship was unquestionably under the protection of the policy when she sailed, and the underwriters, who would have been liable had she been seized in port, could make no objection,' on account of her sailing without sufficient preparation for the voyage, as this was made necessary by the danger of seizure in port. Accordingly the quitting the course of the voyage to put into Jaquemel was held not to be a deviation.(4)

A question has been made whether it is a deviation, if a vessel goes out of its course, or delays, on account of a peril not insured against in the policy. Insurance being made on goods, from Liverpool to Savannah, the vessel arrived at Tybee Bar, off Savannah, on the 25th of February, 1811, where the master learned that, in consequence of an act of Congress prohibiting the importation of goods from Great Britain, the vessel and cargo would be forfeited if he entered the port of Savannah. He accordingly proceeded to Amelia Island, where the vessel remained until she could safely enter the harbour of Savannah.

It was insisted in behalf of the underwriters, that, as they would not have been answerable if the vessel and cargo had been seized and condemned for violating the non-intercourse law by entering the port of Savannah, this was a departure from the course of the voyage to avoid a peril not insured against, and which could not be insured against legally; and therefore that it was a deviation; and of this opinion were the court.(1)

(1) *Breed v. Eaton*, 10 Mass. Rep. 21.

A vessel insured for a voyage 'from New York to Port au Prince, French risks excepted,' was captured by a French privateer, and recaptured by an English frigate, and afterwards condemned at Jamaica as French property. Mr. Justice Radcliff, giving the opinion of the court on the question, whether the risk was determined by the French capture, said, 'The voyage was thereby materially interrupted, and the subject placed in a new situation. It cannot be said that the perils were not increased, nor that the subsequent capture was not a consequence of, or probably occasioned by, the first. It is not material that it should appear to be so. It is sufficient that the voyage was interrupted and the vessel stopped, for at least four days, by an event, the risk of which was undertaken by the assured. This detention, like a deviation, altered the risk, and must be considered as discharging the policy.'(2)

(2) *Roget v. Thurston*, 2 Johns. Cas. 248.

Insurance was made upon goods on board of the *Catharina*, 'at and from Lagaira to the ship's port of discharge without the Baltic, north of Gothenburg, free of capture and seizure, and the consequences thereof, in the port of Lagaira.' When the vessel was about half loaded at Lagaira, then in possession of the Patriots, the Royalists advanced upon the place. To avoid seizure and capture, the *Catharina* was obliged to depart immediately from the port, and the master was compelled by the magistrates to take on board a number of Patriots, who would have been in danger of being massacred, if they had remained on shore. With these persons on board the vessel sailed for St. Thomas's; but being light, she fell to the leeward, and made the island of Casa del Muerte, to the southward of Porto Rico, from whence she was unable to beat up to St. Thomas's, which she might have done had she not been so light. And partly to repair the rudder, and partly for the purpose of completing his cargo, the master proceeded to Jaquemel, in St. Domingo, which, though considerably out of the direct course to England, was the most convenient port for making the repairs and completing the cargo. He could not touch at any of the Spanish islands on account of having the Patriots on board. The vessel was wrecked at Jaquemel. Chief Justice Gibbs told the jury that the assured was not entitled to recover. To avoid capture and seizure in port, 'for which the underwriters would not have been liable, the ship cut her cable and proceeded to sea in a state in which she was not properly fit to perform the voyage home. After that, she goes out of the course to unload her outward and complete her homeward cargo, without any liberty for that purpose, which she could not do at the risk of the underwriters.'(3)

(3) *O'Riley v. Roy. Ass. Co.* 4 Camp. 248.

But where the master of a vessel bound to Holland, being informed in the course of the voyage that the port of destination was blockaded, on this account, quitted his course, and put into Plymouth, in England, where he concluded to give over the voyage, and accordingly proceeded from that port to London, and discharged his cargo there; the opinion of the court was, that the 'deviation must be considered as commencing on the vessel's sailing from Plymouth.'⁽¹⁾ It was the opinion of the same court, that when a voyage was abandoned under these circumstances, 'the loss did not arise from any of the perils insured against;' in the common form of the policy.⁽²⁾ From these two cases it is to be inferred, that the going off the course from a 'just fear' of a peril not insured against, is not necessarily a deviation.

- (1) *I. & C. v. Gray*, 7 Mass. Rep. 349.
 (2) *Richardson v. Maine Ins. Co.* 6 Mass. Rep. 121.

Goods were insured on a voyage from Liverpool to Amsterdam, 'against sea-risks and fire only.' The vessel was arrested on the voyage, by a commander of a public ship, and carried into Falmouth, and detained for more than a month. After being released, she proceeded on the voyage. It appeared that after the time when the vessel was so detained, the goods had sustained sea-damage. The loss by sea-damage being claimed, it was objected that the vessel's being thus taken out of the course of the voyage, was a deviation; and asserted that 'no case could be cited to show that a deviation is excused, which was to avoid a peril to which the underwriters would not have been liable, had it happened.' The opinion of the court was given by Sir James Mansfield, who said, 'At first it struck me that there was something like a difference between a limited and a general policy, yet on further consideration, I do not think that there is any difference. I do not find any distinction between the present insurance, and the ordinary insurance, including all the risks which are insured in policies in general.'⁽³⁾ It was therefore the opinion of this court, that the being taken out of the course by a peril not insured against, is not a deviation.

- (3) *Scott v. Thompson*, 1 N. R. 181.

In a case of insurance from Exeter to London 'against capture only,' the vessel was blown to the coast of France and there captured, where but for the peril of capture, she would have been in perfect safety. Lord Kenyon told the jury that 'the case was too clear to admit of argument, this was clearly a loss by capture.'⁽⁴⁾

- (4) *Green v. Elmslie*, Peake, 212.

In this case the vessel was brought, by a peril not insured against, to be imminently exposed to one that was insured against; but still it might be said that there was nothing extraordinary in the peril not covered, and so it was no more than must have been contemplated by the parties. Lord Ellenborough, speaking of a case of insurance against only a part of the usual perils, says, 'If a ship meet with sea-damage, which checks her rate of sailing, so that she is taken by an enemy from whom she would otherwise have escaped, the loss is to be ascribed to the capture. The case of *Greene v. Elmslie*, proceeds upon a similar principle.'⁽⁵⁾ And so in general, a loss is considered as arising from that peril by which it is immediately

- (5) 12 East, 653.

and directly occasioned, although some other peril may have remotely and indirectly contributed to it.

Insurance was made upon the schooner Sukey and Polly, 'from New Orleans to Cape Nichola Mole, and thence to St. Thomas's, *against sea-risks only.*' The schooner having come in sight of Hispaniola, on her voyage to Cape Nichola Mole, in that island, was ordered away from the island by a British ship of war, the commander of which told the master of the schooner that all the French ports of Hispaniola were blockaded; and he endorsed the notice on the schooner's register. Being thus turned away from Cape Nichola Mole, the schooner proceeded for St. Thomas's, the next port of destination; but before arriving there, sustained sea-damage, and was compelled to put into Kingston, in Jamaica, where she was condemned as not worth repairing. Chief Justice Kent said, 'A deviation from necessity will excuse the assured, in case of an insurance against any particular risk, as well as in the case of a general insurance. There is not probably any exception to be met with, to the application of the general principle, that if the vessel departs from the usual course of the voyage from necessity, and departs no further than that necessity requires, the voyage will still be protected by the policy.' And he accordingly thought this not a case of deviation. Judges Tompkins, Spencer, and Thompson, concurred in this opinion. But Judge Livingston was of a different opinion. He said he should assume as a fact, that the schooner might have reached Cape Nichola Mole, had she not been turned away; 'and as a principle of law that every departure from the course of a voyage, unless occasioned by a peril insured against, or an apprehension of such peril, is a deviation. In ordinary insurances, because comprehending every peril, all accidents which produce deviations, must necessarily be embraced by them. On such policies, if a vessel be forced out of its way by enemies, pirates, a storm, or the crew; or go into port to repair damages occasioned by lightning or fire; it is no deviation, *because* the assurers must have borne the loss if she had been captured, carried away by the mariners, or perished in a tempest, or by fire, or lightning. It would seem, indeed, that the only reason why leaving the course of the voyage can be excused, is, its proceeding from the hazard insured against, or from a reasonable apprehension of such peril. Otherwise, within however narrow limits his responsibility may be confined, an insurer will still be answerable, consequently at least, for every loss, without any regard to its cause. Is it not rather the express contract, as well as fair understanding, in all restricted policies of this nature, that for injuries proceeding directly or indirectly from the enumerated risks alone, and no other, shall an indemnity be asked? If not, great injustice must frequently arise, or nearly the same premium will be required for a single, as for all risks. When dangers of the sea are alone insured against, the principal matter taken into the estimate in settling the rate of premium, is the ordinary length of the proposed voyage; but a risk, which it was fairly imagined would terminate

in less than a month, may be protracted for years, by repeated captures and other incidents not insured against. In an insurance against capture alone, the risk must always depend more or less on the state of the winds and weather. Two vessels, in performing the same voyage, and at the same time, may have different weather and different passages. One may arrive in a month, and the other not in double that time, and yet a capture of the last, although delayed by bad winds and storms, would be a loss within the policy, as well as the first. Suppose a vessel to be insured against capture only, from Albany to New York, who can doubt, if she grounded on one of the bars in Hudson's river, and were taken while there waiting for the tide, that the insurer would be responsible? (1)

(1) Robinson
v. Mar. Ins.
Co. 2 Johns.
89.

It appears from some of the preceding cases, that a ship insured to different ports successively, may pass by any of them without touching, provided she touches at the others in their proper order. Without denying this principle, it is difficult to make any question in respect to deviation, in the last case, on account of the schooner's not stopping at Cape Nichola Mole, unless the distinction be assumed, that although the captain might have voluntarily omitted that port, and the risk would still have continued, yet it was a deviation to omit it from constraint, or the fear of a peril not insured against. This would be a very strict construction. It is not like the case of the master's being limited to one out of three different courses of the same voyage, (2) instead of being left to choose his course according to his own discretion at the dividing point; for the exercise of discretion on the part of the captain, in choosing his course, is supposed to have relation to the degree of sea-risk, whereas the right of the assured to omit a port, has no relation to the sea-risk. The captain is supposed to choose one out of three courses, because he thinks it the most safe or expeditious, but the assured is supposed to choose to omit, or touch at a port, from a consideration of the state of the markets.

(2) Supr. 185.

It is difficult to devise any principle to which these cases respecting a departure from the course of the voyage, on account of a peril not insured against, may be referred, and by which they may be reconciled and shown to be consistent with each other. Nothing is said in them respecting any fault on the part of the assured, but the question is precisely the same as if two policies were made upon the same voyage, one against sea-risks, and the other against capture. If in such a case the assured could not stop to repair sea-damage, without forfeiting the insurance against capture, and *vice versa*, could not change his course to avoid capture without forfeiting all claim of indemnity for subsequent sea-damage, the two policies would afford him but an imperfect indemnity, though they might both embrace all the perils insured against in a policy of the common form. When an underwriter insures against capture *only*, he cannot but know that the property is to be exposed to sea-risks, and it seems not to be a more liberal construction of this contract, than is adopted in many other instances, to hold that the right of indemnity does

not cease, unless the risk of capture be *unnecessarily* enhanced or altered, or the voyage be broken up. This seems to be the only construction of the contract by which the intention of the parties in making it, can be effected.

Whatever the assured may *intend*, yet if he actually does nothing to increase or change the risks insured against, the underwriter remains liable. An intention to deviate is not a deviation. (1)

In case of insurance for a voyage from Carolina to Lisbon, and thence to Bristol, it appeared that the master had taken in salt, which he was to deliver at Falmouth before going to Bristol, but the ship was taken while on the course to both places, and before changing the course to put into Falmouth. Chief Justice Lee held that this, being merely an *intention to deviate*, did not discharge the underwriters. (2)

It appeared that the master of a vessel insured for a voyage from Guadaloupe to Havre, had been ordered to keep in the course to Brest, for safety; from which it was urged, in behalf of the underwriters, that the real destination was to Brest, and that there had been a deviation; in regard to which Lord Mansfield said, 'The voyage to Brest was, at most, but an *intended* deviation, not carried into effect.' (3)

Goods being insured from Grenada to Liverpool, the master sailed with instructions, and an intention to touch at Cork, but the vessel was lost before coming to the dividing point. The court said, 'Where the *termini* of the voyage were really the same as those described in the policy, it was to be considered the same voyage, and a design to deviate would not vitiate.' (4) But in a policy on the ship for the same voyage, Lord Kenyon nonsuited the assured, upon the ground that the voyage upon which the ship sailed, was not the voyage described in the policy. (5)

Where the voyage insured was from Cork to London, the master intended to touch at Weymouth, but before he turned off for that purpose, he was overtaken by a storm and driven into that very port. Lord Kenyon held this not to be a deviation. (6)

The same rule as to an intended deviation is universally adopted by the courts of the United States. (7)

As a deviation is the unnecessary varying of the risks assumed by the underwriters, it cannot take place until after the risk has commenced; there must have been some time when the insurers would have been liable for a loss, or there can be no deviation. This makes it of importance to distinguish between the commencement of the risks insured against, and the undertaking of a different adventure; a distinction of some difficulty in many cases, since the courts have put it in some degree upon the *intentions*, as well as the *acts* of the assured.

It was said by Lord Mansfield, that, 'in all cases of a deviation, merely intended, but never carried into effect, the *terminus a quo* and *ad quem*, were the same.' (8) Accordingly it has been held in a number of cases that if the voyage intended, is not to the port of destination named in the policy, it is a different voyage

An *intention* to deviate, does not discharge the insurers.

(1) Hogg v. Horner, Park, 475; Bain v. Kippen, Millar, 445; Bynk. Quaes. Jur. Priv. l. 4. c. 3.

(2) Foster v. Wilmer, 2 Str. 1249.

(3) Thellusson v. Fergusson, Doug. 361.

(4) Kewley v. Ryan, 2 H. Bl. 343.

(5) Stott v. Vaughan, Marsh. Ins. 202.

(6) Kingston v. Phelps, cited 7 T. R. 161. See also Heselton v. Allnutt, 1 M. & S. 46; and Wooldridge v. Boydell, Doug. 16.

(7) 1 Johns. Cas. 184; 2 Caines' Cas. in Err. 172; 2 Caines, 274; 11 Johns. 261; 7 Mass. Rep. 349; 3 Cranch, 384.

It is not a deviation to sail upon a different voyage.

(8) Doug. 18.

from that insured; and the voyage insured does not in such case commence. A vessel insured for a risk, 'at and from Maryland to Cadiz,' cleared out for Falmouth, in England, and gave bonds to land the cargo in Great Britain, and sailed with the intention to make Falmouth the port of destination, but was captured on the common course to both Falmouth and Cadiz. It was held that this was not a case of intended deviation merely, since, as Mr. Justice Buller said, 'there could not be a deviation from what never existed;' but that the voyage upon which the vessel sailed, was different from the voyage insured.(1)

(1) *Wooldridge v. Boydell*, Doug. 16.

In case of insurance on a ship from Newfoundland to England; the vessel stopped to fish on the Banks, and was afterwards lost on the voyage to England. Buller, J. said, 'The voyage insured was from a port in Newfoundland to England, whereas this vessel sailed to the Banks, which was a different voyage.'(2)

(2) *Way v. Modigliani*, 2 T. R. 30.

(3) Doug. 17.

Lord Mansfield says, 'deviations arise from after-thoughts, after-interest, after-temptation;'(3) and he seems to think that a deviation is distinguished by this circumstance from the sailing on a different voyage. 'The other circumstance by which a deviation from the voyage insured, and a sailing on a different voyage, were distinguished by the same judge, is, that in a case of deviation, 'the *terminus a quo* and *ad quem*, are the same,' which are named in the policy.(4)

(4) Doug. 18.

But it is difficult to reduce the different decisions within these principles. In a case above cited, in which, under a policy on a voyage from Guadaloupe to Havre, the insurers insisted that the ship had sailed on a voyage to Brest, and accordingly had not sailed on the voyage insured, although at the time of the capture she was on the common course to both Havre and Brest; Lord Mansfield said, 'The sailing on the voyage to Brest, was, at most, but an *intended deviation*.'(5) This seems to be assuming that the vessel may sail for a port different from the port to which she is insured, and yet be considered as sailing the voyage insured, while she is on the common course to both ports.

(5) *Thellusson v. Fergusson*, Doug. 361.

In case of the captain's being limited, at the commencement of the voyage, to one out of three different courses, instead of being left to use his own discretion in choosing his course, when he came to the dividing point; Mr. Justice Lawrence said, 'If the ship had been captured before she took the northern course, I should have thought that the assured would have been entitled to a verdict.'(6)

(6) *Middlewood v. Blakes*, 7 T. R. 164.

(7) *Foster v. Wilmer*, 2 Str. 1249; *Carter v. Roy*, Ex. Ass. Co. 2 Str. 1249.

In two other cases decided in the time of Chief Justice Lee,(7) the insurers were held to be liable for a loss happening while the ship was on the course to the port to which she was insured, although the captain had at the time of sailing intended to deviate from the voyage. It seems therefore to be pretty well settled, that the time of forming a design to deviate, whether it is before or after the commencement of the voyage, is of no importance. At whatever time the intention may have been formed, as long as the assured has done no act, in pursuance of such intention, by which the risks insured against are increased or varied, the insurers continue to be liable.

This question has come under consideration in subsequent cases. Goods being insured from Heligoland to Memel, the assured instructed the captain to go to Gothenburg, and there ascertain whether he should proceed to Anholt or Memel. The ship proceeded on the voyage, and being on the course to Gothenburg, and within five miles of that place, was driven by a gale of wind under the batteries of Skegan, where she was captured. The ship had not actually departed from the course to Memel, previously to her being captured. Lord Ellenborough said, 'I think there was an inception of the voyage insured. The way in which it strikes my mind, is, that the preponderating purpose of the assured was to go to Memel, although that intent was liable to be changed according to circumstances. But I am not aware that it is laid down in any book, if the *terminus* be once fixed, that because it is made subject to alteration dependent upon circumstances, it shall on that account be less a voyage to that place to which the party originally contemplated to go. I think there may be a good inception of the voyage under a fluctuating purpose.'⁽¹⁾

(1) *Heseltan v. Allnutt*, 1 M. & S. 46.

In a case decided in New York, insurance was made on a voyage from Wilmington, in North Carolina, to Falmouth, in England, but the vessel cleared out for New York, for the purpose it seems of obtaining seamen, and with the intention, on the part of the captain, of then proceeding to Falmouth, to which port the goods were consigned. She was lost before turning off for New York, and while on the course to either that place or Falmouth. One question in the case, was, whether this was only an intended deviation from the voyage insured, or a different voyage. Radcliff, J. said, 'If the course from Wilmington to New York had varied from the very port or wharf from which the vessel sailed, could she with any propriety be said to have commenced her voyage to Falmouth, or to have deviated from it? There could, then, clearly have been no inception of the voyage to Falmouth, and of course no deviation. If so, can the accidental circumstance of the *iter*, being the same for a short distance, alter this case in principle, or essentially change the character of the voyage; I think not. It was still a separate and equally distinct voyage.' He accordingly appears, to have been of opinion, that the original intention of deviating makes the voyage upon which the vessel sails, different from the one insured; or, in other words, the voyage insured never commences if there be an original intention of varying the risks insured against. But Mr. Justice Kent was of a different opinion. 'The courts,' said he, 'have gone a considerable length towards giving us a precise and definite criterion, by which we can identify a voyage. Where the *terminus a quo*, or commencement of the intended voyage, and the *terminus ad quem* or conclusion of it, are the same with the *termini* of the voyage described in the policy, the voyage intended, and the voyage insured, are the same, notwithstanding any proposed deviation, or touching at any intermediate port out of the usual and direct course of the voyage. In the present case had an *actual* deviation, without

necessity, taken place, the defendant would have been discharged. No such actual deviation is pretended.' Mr. Justice Lewis thought that, 'to fix a criterion that shall determine in all cases, between a contemplated deviation and a distinct voyage, is difficult, if not impossible.' But both he and Chief Justice Lansing were of opinion that this was not a case of a distinct voyage.(1)

(1) *Silva v. Low*, 1 Johns. Cas. 184.

Under a policy on a ship from Barcelona to Baltimore, a loss happened in the port of Barcelona. One of the objections to the claim for the loss was, that the vessel, as the underwriters alleged, was destined to sail for Havana, and not for Baltimore; and so a distinct voyage was undertaken. In regard to this objection, Mr. Justice Livingston said, in giving the opinion of the court, 'The insurance being *at and from Barcelona*, it may admit of doubt, whether, as the loss happened *there*, the defendants would not be liable, though a voyage to Havana were in contemplation.'(2)

(2) *Steinback v. Col. Ins. Co.* 2 Caines 129.

And Chancellor Lansing, giving the opinion of the court of errors, in the same case, said, 'Whatever change in the destination of the vessel might have been contemplated, *the risk having commenced*, the insurer was entitled to his premium;' which seems very strongly to favour the opinion that the original purpose of sailing for a different port does not make a distinct voyage.(3)

(3) *Smith* [Pres. of the Col. Ins. Co.] *v. Steinback*, 2 Caines' Cas. 172.

Another case decided in the same state, on a demurrer to the plaintiff's evidence, seems to favour the opinion that sailing on the course to the port to which the vessel is insured, but with a real destination to a different port, is a sailing on a different voyage. The insurance was from New York to St. Andero, in Spain. The vessel having made Cape Ortegal, was proceeding to the port of St. Andero, when she was captured. But according to the testimony, she sailed for Hamburg, and was on her voyage thither when she made Cape Ortegal, and she then proceeded towards St. Andero, with the intention of staying there until the season should be more favourable for proceeding to Hamburg. It is not stated that the vessel had been actually on the course to St. Andero, during the whole voyage, until the time when she was captured. The court said, 'There is not a particle of evidence to prove that the voyage was ever undertaken for St. Andero, but the contrary is proved. There appeared, therefore, nothing from which any legal inference could be made by the jury, that the vessel sailed on the voyage insured.' By the general tenor of the opinion of the court, as delivered by Mr. Justice Radcliff, it seems to be implied, that if the ship *actually* sail on the course of the voyage insured, but with the intention of making a different port from that to which she is insured, it is a distinct voyage, and the voyage in the policy does not commence.(4)

(4) *Forbes v. Church*, 3 Johns. Cas. 159.

Under a policy for a voyage 'at and from Newry, in Ireland, to New York,' the vessel cleared out for New York, but took passengers whom the master, with the concurrence of the agents of the assured, agreed in writing to land at Halifax, in Nova Scotia. While the vessel was proceeding down the Irish

Channel, and before turning off for Halifax, she struck on a rock; and a claim was made for the loss occasioned by this accident. Chief Justice Kent gave the opinion of the court, 'that the previous intention to touch at Halifax, did not make it a different voyage; as the *termini*, as well as the substantial object of the voyage described in the policy, and of the voyage upon which the vessel sailed, were the same.' Livingston, J. said, 'Both in England and this country, it is well settled, that an intention, however strong or well ascertained, to touch at an intermediate port, not mentioned in the policy, does not constitute a different voyage, but only an intention to deviate. Were this *res integra*, doubts might reasonably be entertained; but it is no reason for shaking the authority of several adjudged cases, merely because a better rule might possibly have been adopted.'⁽¹⁾

(1) *Henshaw v. Mar. Ins. Co.* 2 Caines, 274.

A policy was made on goods from New York to Gothenburg, and at and from thence to one port in the Baltic. On arriving at Gothenburg the master determined to go to St. Petersburg, which election was considered as limiting the voyage insured to that port of destination, and as taking away any further exercise of discretion in this respect. The vessel sailed for St. Petersburg, but on account of sea-damage was compelled to put into Carlsham, in Sweden, to repair, where she was detained until it was too late in the season to proceed to St. Petersburg, and she accordingly remained there till the next spring, when she sailed for Stockholm instead of St. Petersburg, and the day after sailing, being on the course for either Stockholm or St. Petersburg, was captured by a French privateer, and was afterwards condemned as prize. Chief Justice Thompson, in giving the opinion of the court, said, 'Had the policy in this case been originally filled up with St. Petersburg, as the port of delivery, or had that port been elected as the *terminus ad quem*, before the vessel left New York; and afterwards, but previous to her sailing, the assured had changed the voyage to Stockholm, this would have been substituting a new voyage; the risk would never have commenced, and there must have been a return of premium.' The opinion of the court accordingly was, that there had been neither a substitution of a different voyage, nor a deviation, and that the assured was entitled to recover the loss. But Mr. Justice Van Ness dissented. He said, 'In every case, (and I affirm it without exception) where an unexecuted intention to depart from the usual route of the voyage, has been held not to vitiate the policy, it will be found that the *terminus ad quem*, mentioned in the policy, was not abandoned, but that the vessel intended ultimately to proceed to it. In case a determination is formed to deviate, no matter whether before or after the voyage is commenced, provided the voyage insured is intended to be performed, the ship may be said to be upon the voyage, though not in the customary route; but with what propriety or reason can it be said, if the *terminus ad quem* is completely abandoned, a different port of destination adopted, and

(1) *Lawrence v. Ocean Ins. Co.* 11 Johns. 241. the vessel proceeds in pursuance of such change of design, that she is pursuing the voyage insured?(1)

The judgment given in this case was affirmed in the court of errors, fourteen of the judges being in favour of affirming, and eight in favour of reversing it. Chancellor Kent was of the latter number, and gave an elaborate opinion. He said, 'A voyage imports a definite commencement and end. It is known and characterized by its *termini*. They are the recognised tests of its identity. It is equally clear that deviation is applicable only while the same voyage continues. Deviation is not a change of the voyage, but of the proper and usual course in performing it. The voyage insured is never lost sight of in cases of deviation, actual or intended. A voyage is always deemed the same, whatever be the deviation, provided the original port of destination be not abandoned. And because the question of deviation always presupposes and admits a continuation of the original voyage, it follows that a mere intention to deviate, whether formed before or after the commencement of the voyage is no deviation, if the intention was never carried into effect. But if the original place of destination be abandoned, in order to go to another port of discharge, the voyage itself becomes changed, because one of the *termini* of the original voyage is changed. The identity of the voyage is gone, and a new distinct voyage is substituted. In that case intention is every thing, because on that depends the fact, whether the original voyage was, or was not, abandoned. And if the intention to abandon be once clearly and certainly established, it then becomes perfectly immaterial whether the vessel was lost before or after she came to the dividing point, because, in either case, she was lost, not on the voyage insured, but on a different voyage.

(2) *New York Firem. Ins. Co. v. Lawrence*, 14 Johns. 46.

A distinction has, however, been set up between the intention formed before or after the voyage commenced, to change the voyage, by dropping the port of destination and selecting another. It is admitted by those who make this distinction, that the intention to change the voyage, and sailing under that intention, discharges the insurer if formed *before* the commencement of the voyage; but if formed *after* the voyage is commenced, it is then likened to an intention to deviate in the same voyage, and does no harm, if the loss happens while the vessel is still on the common track. I am persuaded that there is no foundation for this distinction. In one case the vessel is in fact sailing on the same voyage, in the other on a different voyage. The new voyage was in the *act of performance*, as much before, as it could have been after passing the dividing point.(2)

This question has been considered also by the Supreme Court of the United States, in an action upon a policy on a vessel 'at and from Kingston, in Jamaica, to Alexandria, in Virginia.' The vessel took freight for Baltimore, as well as Alexandria, intending to touch at Baltimore first; and was captured while on the common track to both those places. Mr. Justice Johnson said, 'The ordinary rule for ascertaining the identity

of a voyage is by adverting to the *termini*. If this rule has any defect, it is not extending far enough the claim to indemnity, as the *terminus ad quem* may in many instances be relinquished, without any possible increase of risk, and without varying the risk. I will instance the case of an insurance from America to St. Petersburg, when the vessel is, in fact, to terminate her voyage at Copenhagen.' And as the final port of destination, or *terminus ad quem*, was not changed in the case under consideration, it was held by the court that the vessel had sailed on the voyage insured, and that there had been no deviation before the loss took place.⁽¹⁾

(1) *Mar. Ins. Co. v. Tucker*, 3 Cranch, 357.

The doubts and perplexity in which the preceding opinions are involved, as well as their discrepancy, afford pretty strong presumption of some defect in the principles assumed. The voyage is said to be the same, while the extreme points remain the same, but no reason is any where given to show that the identity of a voyage depends upon these points, any more than upon others. The *terminus a quo*, and the *terminus ad quem*, are said to characterize a voyage, but they do not seem to characterize it otherwise than by giving it a name or description. If two ships sail from Boston to Liverpool, the one by the way of Halifax, the other by the way of Havana, though the ports of departure and final destination are the same, and the names of both are used in giving a description of the voyage on which either ship sails, yet it is quite evident, that, as to all the purposes of insurance, these voyages are as different from each other, as if one of them terminated at Havre de Grace instead of Liverpool. Though the ports of departure and final destination are used in describing the voyage, it does not appear in what respect the identity of the voyage, to any material purpose, depends upon these any more than it does upon any intermediate port or part of the course.

Judges have, in one or two instances, regretted that courts had gone so far in applying the principle, that an intention to deviate is not a deviation, but the reasons of this regret do not appear. Take the instance, put by Mr. Justice Johnson, of an insurance on a voyage from New York to St. Petersburg, and suppose that the assured concludes, after effecting the policy, to terminate the risk at Copenhagen, and thus to exonerate the insurers from a part of the stipulated indemnity, while he pays the entire premium. It does not appear what objection there possibly can be, to enforcing the contract, and giving the assured the advantage of it to this extent, and as far as he brings himself within its conditions. The reason is, at least, equally strong in favour of considering the policy to be applicable to a voyage, as far as the vessel actually proceeds upon it, although the captain, without the knowledge of the assured, sails with the intention of finally making a different port of destination. Where the property is for a certain time within the conditions of the risk, courts would no doubt hesitate to decide that the assured can entitle himself to a return of premium, by showing that he himself, or the master of the vessel, had an intention,

(1) 3 Cranch,
385.

whether before or after the risk was to attach, that the ship should deviate, or finally proceed to a different port of destination. On the contrary, the cases relating to the commencement of the risk, and the decisions respecting the right to a return of premium, are pretty direct and strong in support of the opposite doctrine. If then, as Mr. Justice Johnson suggests,⁽¹⁾ any principle assumed ought to operate reciprocally, and equally, in respect to both parties, which proposition is too plain to be doubted of, it seems to be a just, if not necessary inference, that the assured is entitled to recover for any loss happening before such intention is manifested by some act, whereby the risks insured against are affected and changed. The assured, in claiming a return of premium, cannot, to entitle himself to such return, take advantage of any alleged intention which was not so manifested by acts, either before the commencement of the risk, or at the agreed time of its commencing, that he would be bound by the intention, and the insurers could fix it upon him; and therefore, since the rule ought to operate equally, the insurers ought not to be able to take advantage of the intentions of the assured to avoid paying a loss, of which the assured could not have taken advantage in claiming a return of premium. If, in any case whatever, the intentions of the assured are to be held not to affect the rights of the parties until some act is done by which the risks insured against are altered, there seems to be very strong reason in favour of following the principle out in all its direct consequences, and holding that in all cases where the risk has commenced, it continues until the risks assured by the underwriters are actually altered, that is, until a deviation actually takes place.

But in regard to the commencement of the risk, it might be necessary to consider the intention of the assured, and his agents, in order to put a construction upon acts which might be considered as done in prosecution of the voyage insured, or of another voyage. If the owner of a ship effects insurance upon her for a voyage at and from New York to London, before the ship has arrived at New York, or before any preparation is made for the voyage; and before the arrival of the ship, or any act done in preparation for the voyage, so as to give a commencement to the risk, the assured changes his plan and determines to send his vessel to Lisbon, and before the risk would begin in the ordinary course under such a policy, does acts which unequivocally prove the change of plan, and afterwards actually despatches the ship on a voyage to Lisbon, it would seem reasonable enough that the insurers should not be liable for any loss that might take place in the port of New York, or on the common course from New York to both London and Lisbon, and also that the assured should be entitled to a return of premium. The question, in such case, is, whether the risk has commenced. But since, where the property is apparently within the conditions of the contract, courts would require very distinct and unequivocal proof of purposes and acts of the assured, to show that he is entitled to a return of premium on the

ground that the property has not really been within those conditions, it seems but just to interpret his acts and purposes by the same principles, where they are to operate against his claim for a loss. In determining whether the risk on a voyage, commencing at a particular place, has begun, the fact of the ship's being at that port, and the acts of the assured at such port relating to the voyage, and the intentions of the assured in reference to which such acts are to be interpreted, are certainly of great importance. His intention in regard to the final port of destination is no doubt entitled to consideration, but his intention in other respects may be equally important in giving a construction to his acts, and there appears to be no reason for inquiring into his intentions, except for the purpose of determining what construction to put upon his acts, which require to be explained.

(1) *Henkle v. Roy. Ex. Ins. Co.* 1 Ves. 317; *Barnewall v. Church*, 1 Caines, 217; *Talcot v. Mar. Ins. Co.* 2 Johns. 130. (2) *Phyn v. Roy. Ex. Ass. Co.* 7 T. R. 505; *Brazier v. Clap*, 5 Mass. Rep. 1.

The mere circumstance of clearing out for a port different from that to which the vessel is insured, is not of itself a proof that a distinct voyage is undertaken, nor is it necessarily such a change of the risk as is equivalent to a deviation.(1)

The effect of taking a false clearance.

In order to render such a clearance a deviation, or to give it the same effect, it must appear that the risk is thereby increased or changed in the particular case.

The circumstance that a deviation takes place through the mistake or negligence of the captain, does not prevent its discharging the underwriters, since his mistakes and negligence are at the risk of the assured.(2)

Deviation by the mistake or negligence of the captain.

A bottomry bond made in the common form is forfeited by a deviation.(a)

A bottomry bond is forfeited by a deviation.

In the case of an insurance of a building against fire, an unnecessary and voluntary change and enhancement of the risk will discharge the insurers from all subsequent liability under the policy. If a building, that is insured against fire, is so altered by the assured as to render the risk greater, the insurers will not be liable for any loss that may happen after the alteration is made.(b)

Change of the risk under a policy against fire, discharges the insurers.

The insurers may waive taking any advantage of a deviation; which must be done in writing to make it binding, at least if it be after the deviation, and after the policy is subscribed.(3) It seems to be implied by Lord Kenyon, that if the intention to deviate be 'communicated' to the underwriters before subscribing the policy, this will justify it. He implies this in his opinion in the case of the captain's being limited to one course out of three different courses of the same voyage; in regard to which, he said, 'That was a most important fact, and ought to have been communicated to the underwriters.'(4) But this may be only an inaccurate expression of his opinion, that the fact ought to have been inserted in the policy, since the mode of communicating this fact to the underwriters was not the particular subject of consideration in the case.

In what manner a forfeiture of the insurance incurred by a deviation may be waived.

(3) *Crowningshield v. New York Ins. Co.* 3 Johns. Cas. 142. (4) *Middlewood v. Blakes*, 7 T. R. 163.

(a) *Harman v. Vanhatton*, 2 Vern. 717; *Western v. Wildy*, Skin. 152; *Williams v. Stedman*, Skin. 345; *Holt's Rep.* 126. (b) *Stetson v. Mass. Mut. F. Ins. Co.* 4 Mass. Rep. 330.

CHAPTER XIII.

RISKS COVERED.

Section 1. Acts of Agents.

IN policies upon lives, and against fire, the peril insured against is of so definite a nature, that no doubt can arise in regard to the description of risk assumed by the insurer.

The risks most usually insured against in marine policies are perils of the seas, fire, piracy and theft, barratry, capture, arrests and detentions, and all other perils. This general clause, by which the insurers undertake to make indemnity for all damage and loss that may happen to the property from any peril whatever, is very much narrowed by the construction which courts have given it.

The liability of the insurers is subject to one limitation in regard to all the perils assumed by them in the policy. Although a loss may be immediately and directly occasioned by a peril insured against, yet if the operation of that peril in causing the loss is occasioned by conduct of the assured or his agents, which is not insured against, the insurers are not liable for the loss. Thus if the insurer assumes the risks of the seas and fire, but not that of the negligence and misconduct of the agents to whom the assured entrusts the property, and the property is burnt or sunk by the negligence or misconduct of such agents, the insurers are not answerable for the loss. So if the insurer assumes the risk of the negligence and misconduct of agents, employed by the assured, but not of the assured himself, and the misconduct of an agent is owing to the fault of the assured, the underwriter is not responsible for the consequent loss.

Whether an insurer can legally bind himself to indemnify a person for his own negligence and misconduct has already been considered. Whatever opinion may be entertained on this subject, it is certain that no underwriter has ever been held, under any contract of insurance, in whatever form, to be answerable for losses directly and evidently occasioned by the fault of the assured himself.

The conduct
of agents may
be insured
against.

But the underwriter may undoubtedly make himself liable to indemnify the assured against the fraud and negligence of his agents, and the only question in this respect, is, whether the contract is so framed as to impose upon him this responsibility. By the common form of the policy, the master of the vessel and the mariners, are the only agents against whose misconduct the assured is protected, and the only acts of the master and mariners usually insured against, are those which amount to barratry. In some places the common form of the policy makes a distinction in regard to this risk, between an insurance upon the

ship or freight, and one upon the cargo or profits, barratry being insured against in the latter, but not in the former case.

No doctrine is better settled than that of the insurer's not being answerable, under the common form of the policy, for losses occasioned through the fault of agents employed by the assured.(1) Mr. Justice Le Blanc says, 'If a loss happen from the want of that which the assured themselves ought to have provided, it could not have been within the intention of the parties to the contract, that the underwriters should be liable.'(2) This doctrine is expressed in innumerable instances. It is not limited to acts of fraud or intentional misconduct. Mr. Justice Kent said, 'The insurers are not liable for losses arising from the mistakes of the owner or master.'(3)

Accordingly the insurers have been held not to be answerable for a loss occasioned by the want of the usual documents of national character, although there was no warranty or representation on this subject.(4) The same opinion was given respecting a loss occasioned by the captain's leaving the ship's register on shore.(5)

This doctrine makes it necessary to determine who are the agents of the assured, and in respect to what acts they are agents; for it is a general rule that a principal is answerable only for those acts of his agent, which are done in pursuance of the authority, and in the exercise of the discretion, with which he invests the agent.

The owner of a ship constitutes the master and mariners his agents for the navigation of the ship, and thereby renders himself answerable for their conduct in this respect; but if, while they are engaged in this employment, they commit theft, or do an act of violence which is nowise connected with this employment, and is not an act done in pursuance, and as a part of such employment, this does not concern the owner.

This distinction is recognised in many instances; but the principles of its application to particular cases, do not seem to have been very definitely settled. It is plain that the master is an agent of the owners, both of the ship and the cargo, to more purposes than the mariners are so. Chief Justice Gibbs has also glanced at a distinction, in this respect, between the owners of the ship and the owners of the cargo. Speaking of a loss by the misconduct of the master and mariners, he says, 'It is extremely hard that the owner of goods should be responsible for a loss occasioned by an act in which he did not concur, and by which he was alone the sufferer.'(6) Sir William Scott also notices the same distinction.(7) But upon what principles, and to what extent, such a distinction is to be made, has not as yet been definitely determined. The owners of the ship are the agents of the shipper for transporting the goods, for which purpose he employs other agents, namely, the master and mariners, for whose conduct in this employment, he is no doubt answerable, in a greater or less degree, to the shipper. And it seems to be more generally implied, that in respect to the acts of agents

The insurers are not answerable, under the common form of the policy, for the acts of agents.

(1) 1 Emer. 804, c. 12. s. 39.

(2) Bell v. Carstairs, 14 East, 382.

(3) Goix v. Low, 1 Johns. Cas. 346.

See also Tatham v. Hodgson, 6 T. R. 656.

(4) Bell v. Carstairs, 14 East, 374.

The assured are answerable only for the conduct of agents as such.

(5) Cleveland v. Un. Ins. Co. 8 Mass. Rep. 308.

(6) Soares v. Thornton, 1 Moore, 385.

(7) The Adonia, 5 Rob. 256.

(1) *Cleveland v. Un. Ins. Co.* 8 Mass. Rep. 321.
 (2) *Le Guillon*, c. 5. s. 9; *Ord. Louis XIV.* h. t. a. 28; *Code de Com.* a. 164; 1 Emer. p. 377. c. 12. s. 4; 2 Valin. p. 79. h. t. a. 28; *Poth.* h. t. n. 120; 1 Mag. p. 50. s. 49; *Hodgson v. Malcolm*, 2 N. R. 336;

for which the owners of the ship are answerable to the shipper, the insurers of the goods are not answerable.(1)

The owners of the ship are answerable to the shippers for damage to the goods in consequence of bad stowage, or in consequence of any gross mismanagement, negligence, or unskilfulness of the master and crew.(a) Accordingly in conformity to the principle above stated, the underwriters, whether on ship or goods, are not answerable to the assured for losses arising from these causes, unless they render themselves so by insuring against barratry, or by some other specific provision in the policy, which shows plainly that the insurers intended to take upon themselves the risk of the negligence, misconduct, or unskilfulness of the master and crew.(2)

It will appear by the cases subsequently cited, in what respect the master and mariners are considered to be the agents of the assured, and for what acts and negligence of theirs, the assured, and not the underwriters, are usually, and under the common form of the policy, considered to be answerable. As the assured is, in general, not entitled to indemnity for the faults and negligence of the master and crew, the question between him and the underwriters, in this respect, is the same that it would be between two sets of underwriters, of whom one should insure against the usual perils, the other against the mistakes, negligence, and unskilfulness of the master and crew. The assured is considered, in all cases, to be his own underwriter, in respect to all risks not insured against in the policy.

The ship is blown up by the carelessness of a mariner.

A vessel, partly laden with powder, was blown up, in consequence of one of the men's negligently placing a candle near the binnacle, which took fire, and by this means the fire was communicated to the powder. It was held that the assured was not entitled to indemnity for this loss.(3)

Loss by resistance of search.

(3) *Grim v. Phoen. Ins. Co.* 13 Johns. 451. See 1 Emer. 441. c. 12. s. 18.
 (4) *Robinson v. Jones*, 8 Mass. Rep. 536. See 9 Cranch, 63; *Robinson's Col. Mar.* 12, 118, 168.
 (5) *Supr.* 145.
 (6) *The St. Juan Baptista*, 5 Rob. 3.

It has been held that if the captain and crew of a neutral vessel resist search, when it is rightfully demanded by belligerents, or attempt to rescue a vessel sent in by belligerent captors for examination, and the property, in consequence of such resistance or attempt to rescue it, is condemned in a belligerent court, the loss cannot be recovered of the underwriters.(4) But if the search is illegally and unjustifiably demanded and made, we have seen that it is not misconduct in the captain and crew to resist it, and attempt to rescue their vessel.(5) Upon the same principle Sir William Scott holds, that resistance of search is not blameable in the master of a neutral vessel, who has not been informed of the declaration of war.(6)

If, in case of shipwreck, the cargo is saved, and the master neglects to procure another ship to carry forward the cargo, where a ship can conveniently be obtained for this purpose, the insurers

(a) *Molloy*, b. 2. c. 2. s. 4; *Abbott*, c. 5; *Jacobsen's Sea Laws*, 95. b. 2. c. 1. In Great Britain the owners are answerable to the shippers for damage of this description only to the amount of the value of the ship and freight. 7 Geo. II. c. 17. Abb. 262. The law in this respect is the same in Massachusetts. Stat. 1818. c. 122.

are not liable for the loss occasioned by this negligence.(1) In case of capture, if a loss is occasioned by the neglect of the master to claim the property, the insurers are not answerable for the loss so occasioned, under a policy containing a warranty of neutrality, provided the master is, at the time of such neglect, to be considered the agent of the assured.(2) Mr. Justice Yeates, speaking of the acts of the agents of the assured as being those of the assured himself, says, 'If the assured, by his own misconduct or neglect, should prevent the property from being finally recovered, the court will consider as saved what might have been so but for his default.'(3)

The master of a vessel, on board of which a part of the crew had died of the plague, came into the port of Marseilles with a false bill of health, and represented that the men had died in consequence of the unwholesomeness of the provisions. The vessel was accordingly permitted to come up to the town, and the men to come ashore, in consequence of which the infection is said to have spread among the inhabitants. The vessel was ordered to be burnt. Upon the ground that the loss had been occasioned by the fault of the captain, the court, in France, held that the underwriters were not answerable.(4)

Losses occasioned directly or indirectly by the mistakes of the captain, made through gross negligence, or from great ignorance and unskilfulness in his profession, cannot be recovered of the underwriters.(5)

Cases have occurred in respect to barratry and deviation, in which the question of the liability of the insurers for the ignorance and mistakes of the master was particularly considered.

Goods were insured for a voyage from London to Jamaica. The vessel having proceeded on the voyage, and cleared the Channel, was carried by a strong current and other causes out of her reckoning, until she was at length found to be between the Grand Canary island and Teneriffe. In that situation the course to Jamaica was to the south-west, but instead of steering this course, the captain, through ignorance, and without any fraudulent purpose, took a north-westerly course, towards the island of Santa Cruz, which was in sight; and in consequence of putting into that island, the vessel was captured. Lord Kenyon, and all the other judges, in giving their opinions, and the counsel of both parties in arguing the case, took it for granted that the insurers were discharged, unless this conduct of the master amounted to barratry. The whole case, therefore, proceeds upon the principle, that the underwriters are not liable for any loss arising from the gross ignorance or mistakes of the master.(6)

A ship and cargo were insured on a voyage from Boston to New Orleans. There are two courses by which this voyage may be performed, the one through the South Channel, the other through the Vineyard Sound. It appeared from the testimony that the *usual* course of the voyage for vessels of the same description with the one insured, was by the South Channel, but the master had taken the other course through the Vineyard

(1) *Schieffelin v. New York Ins. Co.* 9 Johns. 21; *Bradhurst v. Col. Ins. Co.* 9 Johns. 17. (2) *Vandenheuvél v. Unit. Ins. Co.* 2 Johns. Cas. 158; *Gardere v. Col. Ins. Co.* 7 Johns. 520.

The master enters with a false bill of health.

(3) *Bohlen v. Del. Ins. Co.* 4 Bin. 444.

(4) 1 Emer. p. 434. c. 12. s. 17.

Loss by mistakes or ignorance of the master.

(5) *Gregson v. Gilbert, Park*, 103; *Marsh.* 690.

(6) *Phyn v. Roy. Ex. Ass. Co.* 7 T. R. 501.

Sound, though the wind was favourable for pursuing the other and the usual course. Chief Justice Parker instructed the jury that if the master went out of the usual course, through *mistake*, the insurers were discharged. Mr. Justice Sedgwick, giving the opinion of the court respecting the correctness of this instruction to the jury, said, 'A general position that the mistake of the captain, under no circumstances, forms an excuse for a deviation, is certainly not true. The most skilful, discreet, and prudent master may commit mistakes. Where a captain of ordinary skill and discretion forms the best judgment that he can, under the existing circumstances, for the interest of all concerned, the contract of insurance remains unimpaired. But in this case, if the captain had ordinary skill, and was informed, as he ought to have been, of the voyage he was pursuing, no fact exhibited at the trial amounts to an excuse of the deviation. On the other hand, if the deviation happened either from a want of skill, or the gross ignorance of the captain, that would doubtless

(1) *Brazier v. Clap*, 5 Mass. Rep. 1. defeat the claim of the assured to recover.'⁽¹⁾

The principle of this, and of the preceding case, is the same; the insurers are not answerable for the gross and culpable ignorance and mistakes of the captain. But it has already appeared,⁽²⁾ that the insurers continue to be answerable for the risks, notwithstanding any error of judgment in the captain, if he is of competent skill and capacity, and acts according to his best discretion. Consequently, if any loss should, through the medium of some of the perils insured against, be the indirect consequence of an error in judgment of a captain of competent skill in general, and who should act deliberately, and according to his best discretion, the insurers would be liable for the loss.

The stock of a sugar-house damaged through carelessness.

The captain invoices belligerent goods with neutral, and claims the whole as neutral.

The insurers are held liable for the loss of a ship by the carelessness of the mate.

(4) *Coffin v. Newp. Ins. Co.* 9 Mass. Rep. 436.

Lord Ellenborough held, that the damage to the stock of a sugar-house, occasioned by negligently kindling the fire without opening the register at the top of the building, was at the risk of the assured and not the insurers.⁽³⁾

Where the captain, by invoicing belligerent goods with those insured, being neutral, and by claiming the whole as neutral, occasioned the condemnation of the neutral goods, it was intimated that the insurers of the neutral goods were not answerable for a loss arising from this cause.⁽⁴⁾

Two cases have, however, been decided, which seem to favour the doctrine that the underwriters are liable for losses occasioned by the negligence of the mariners. A Russian ship navigated by a Russian crew, was insured in England against 'fire, barratry of the master and mariners, and all other perils.' During the continuance of the risk the ship was frozen up in Biorkoo Sound, in the gulf of Finland, and being left in the care of the mate, was burnt, in consequence of his carelessness in leaving a fire in the cabin, while he went to pass the night on board of another ship. Mr. Justice Bayley said, 'The question is, whether the underwriters are liable for a loss by fire, that fire having arisen from the negligence of the person who had charge of the vessel. There is no authority which says the underwriters are not liable for a loss, the proximate cause of

which is one of the enumerated risks, but the remote cause of which may be traced to the misconduct of the master or mariners. When we find that they make themselves liable for the wilful misconduct of the master, it is not too much to say that they meant to indemnify the assured against fire proceeding from the negligence of the master or mariners.’(1)

The other case was that of an insurance ‘on the boats of the ship *Britannia*, and on produce in said boats, or in any other craft employed in loading the ship, during her stay at St. Kitts.’ The goods were lost by the negligence of the crew. Chief Justice Abbott said, ‘The immediate cause of the loss was the violence of the winds and waves. No case can be cited where, in such case, the underwriters have been held to be excused, in consequence of the loss having been remotely occasioned by the negligence of the crew.’ Mr. Justice Holroyd said, ‘The proximate cause of the loss was a peril of the sea.’(2)

Though the principle should be adopted as unquestionable, that the insurer is not, under the common form of the policy, answerable for losses arising from the negligence or unskilfulness of the master or crew, still a question may occur in regard to what amounts to negligence or mismanagement; and this will evidently depend upon the particular circumstances, and cannot be made the subject of any general rules. The pilot, who had charge of a vessel, sent two men ashore to make fast a line, and cast off a former fast; and the men, immediately on coming ashore, were impressed, and the officers impressing them, being requested to permit them to cast off, and make fast, and also to send the boat back to the ship, there being no other boat belonging to her, refused to do either, but carried the men away and detained them; and in consequence of the rope’s not being cast off, the vessel went ashore and was damaged. Three of the judges held that the damage was not occasioned by any fault of the assured or his agents, and that the insurers were liable for the loss. Chief Justice Mansfield was however of a different opinion, and thought that the underwriters were not answerable for the conduct of the press-gang, which was in effect holding that the assured were answerable for it.(3)

It has been held that the acts of the consignees, by which a loss is occasioned, will give the assured no claim against the underwriters. Goods being insured from New York to Newbern, in North Carolina, the vessel was driven ashore at Ocracoke Point, about eight miles from Newbern, where the consignees ordered the goods to be sold, instead of having them carried forward, as they might have been, to Newbern, in the ship, after she was got afloat again; or in lighters. The voyage was thus broken up, and the goods sold at a great loss, but the court was of opinion that the assured had no claim upon the underwriters, there being no evidence of any actual damage to the goods from the vessel’s running aground.(4)

Goods consigned to Bremen were accepted by the consignees, short of the port of destination, which occasioned the additional expense of lighters to transport them thither. Mr. Justice Yeates

(1) *Busk v. Roy. Ex. Ass. Co.* 2 B. & A. 73.

The insurers are held liable for a loss by the carelessness of the crew.

(2) *Walker v. Maitland*, 5 B. & A. 171.

What is negligence or unskilfulness depends on the particular circumstances.

(3) *Hodgdon v. Malcolm*, 2 N. R. 336.

Acts of consignees.

(4) *Ludlow v. Col. Ins. Co.* 1 Johns. 336.

- (1) *Low v. Davy*, 5 Bin. 595. said, 'These expenses must be ascribed to the agents of the assured, against whose acts there was no stipulated indemnity;' and this was the opinion of the court.(1)

Acts of the government of the assured.

- (2) *Supr.* 159.

- (3) *Hornby v. Houlditch*, 1 T. R. 93. n.

- (4) *V. Supr.* 159.

Where the assured are foreigners in relation to the underwriters, it has been held in some cases, which have been already cited,(2) that the assured cannot recover of the underwriters for a loss occasioned by the acts of the government of which the assured are subjects. These decisions have proceeded upon the ground that the acts of a government are those of its subjects. It is a maxim that every citizen consents to the acts of the legislature.(3) But it has already appeared that this principle is not applicable, where the assured and underwriters are subjects of the same government, and it seems to be very doubtful whether it is applicable, where they are subjects of different governments. The decisions that the insurers are exonerated from losses by the hostile acts of a foreign government, of which the assured are subjects, rest upon an entirely different principle.(4)

The preceding cases afford a general illustration of the principle, that the insurers are not answerable for losses arising directly or indirectly from the fault and gross negligence, ignorance, or unskilfulness of the agents of the assured. The same principle is incidentally mentioned and recognised in many of the cases to be subsequently cited.

Section 2. Barratry.

Although the underwriters are held not to be liable, in general, for any loss occasioned by the fault of the assured or his agents, yet it has already appeared that they may, if they please, make a valid agreement to indemnify the assured against damage and loss by the negligence, or misconduct of the master and crew, or other persons, employed by the assured and entrusted with the property to which the insurance relates. The only risk of this description usually insured against, is that of the barratry of the master or mariners.

Barratry defined.

- (5) *Lockyer v. Offley*, 1 T. R. 259.

- (6) *Lewen v. Suasso*, Postleth. Dic. Art. Assur.

Mr. Justice Willes defines barratry to be 'every species of fraud or knavery in the master, by which the freighters or owners are injured;'(5) and Lord Hardwicke defines it to be 'an act of wrong done by the master against the ship and goods.'(6) Mr. Justice Aston says, 'it comprehends every species of fraud, knavery, or criminal conduct in the master, by which the owners or freighters are injured.' 'Whatsoever,' says Lord Mansfield, 'is, by the master, a cheat, a fraud, a covering, or a trick, is barratry.'(a) Chief Justice Lee said, 'to

(a) *Vallejo v. Wheeler*, Cowp. 56. Chief Justice Tilghman gives the same definition in *Wilcocks v. Un. Ins. Co.* 2 Condyl's Marsh. 534. n. Lord Mansfield says, 'I take the word *barratry* to have been originally introduced by the Italians. In the Italian dictionary *barattare* means, to cheat.' Cowper, 154. 'It is derived from

make barratry, it must be something of a criminal nature, as well as a breach of contract.'(1) Lord Ellenborough says, 'Barratry includes every species of fraud in the relation of the master to his owners, by which the subject matter insured might be endangered.'(2)

It has been held that barratry may be committed by other persons, as well as by the master and mariners of a ship, and on land as well as at sea. Goods being insured 'from London by land carriage to Harwich, and thence by a packet to Gothenburg,' were lost between London and Harwich, by the fraud and negligence of the carriers. Lord Ellenborough said, 'the word barratry was large enough to include every species of fraud committed by the wagoner, or servants.'(3)

Two circumstances then are requisite to constitute barratry; an act of the master or mariners, to be barratrous, must be of a fraudulent nature, and one that is prejudicial to the owners of the vessel. It is accordingly to be inquired on this subject, what acts are of a barratrous kind, and, in the case of a chartered vessel, who are to be considered as owners of the vessel, in respect to acts of barratry.

It was held to be barratry in the master to attempt to evade the duties in a foreign port, whereby the vessel was exposed to forfeiture.(a)

Goods being insured by a general ship, held under a charter-party from Willes, the owner, by Darwin, for a voyage from London to Seville, with liberty to touch at Cornwall for provisions, the captain, instead of sailing with the other vessels bound on the same voyage, lay at the Downs till night, when he sailed for Guernsey, out of the course of the voyage, to take in brandy and wine on his own account, and without the knowledge of the charterer. The night after sailing from Guernsey, the ship sprung a leak, which obliged the captain to put into Dartmouth, whence, after refitting, he proceeded towards Cornwall, but the ship receiving still further damage, was found, on arriving at Helford, in Cornwall, to be totally unfit to proceed on the voyage, and the goods were much damaged. It was contended in behalf of the underwriters, that the going to Guernsey was a deviation, and not barratry. Lord Mansfield said, that Darwin must be considered owner in respect to barratry. 'The master had agreed to go on a voyage from London to Seville, instead of which he goes on an iniquitous scheme, totally distinct from the voyage: that is a cheat and a fraud on Darwin, who thought he

(1) *Stamma v. Brown*, 2 Str. 1173. See also *S. C.* 8 East, 136, cited by Lord Ellenborough from *M. S.*
(2) *Earle v. Rowcroft*, 8 East, 126.

(3) *Boehm v. Combe*, 2 M. & S. 172.

Evading foreign port duties.

Deviation for the captain's private purposes, is barratry.

barat, i. e. *fraud, dolus*.' *Knight v. Cambridge*, 1 Str. 581. See also *S. C.* 8 Mod. 230; 2 Lord Raym. 1349; *Phyn v. Roy. Ex. Ass. Co.* 7 T. R. 505; See 1 Emer. 366. c. 12. s. 3. Negligence and misconduct in the captain, though without fraud, are considered to be barratry on the continent of Europe. 1 Emer. ut Supra.

(a) *Knight v. Cambridge*. It does not appear in the reports of this case what act of the captain was considered to be barratry; but from *Stamma v. Brown*, 2 Str. 1173. and *Vallejo v. Wheeler, Cowp.* 143. it appears to have been an attempt to evade duties.

(1) *Vallejo v. Wheeler*, Cowp. 143; See S. C. Loft, 645, where the facts are more clearly stated, and see 1 Johns. 235. n.

The captain drops anchor to go ashore on account of his own affairs.

Deviation for the interest of owners.

Cruising against instructions.

(2) *Ross v. Hunter*, 4 T. R. 33.

(3) *Hood's Exrs. v. Nesbitt*, 2 Dal. 137; 1 Yeates, 114.

(4) *Moss v. Byrom*, 6 T. R. 379.

Stopping to take possession of a prize.

(5) *Wiggin v. Amory*, 14 Mass. Rep. 1.

would set out directly. The moment the ship was carried out of its course, it was barratry; and here the loss was immediately upon it. Suppose the ship had been lost afterwards, what would have been the case of the assured, if not secured against the barratry of the master? He would have lost the insurance by the fraud of the master; for it was clearly a deviation. Therefore I am clearly of opinion that this smuggling voyage was barratry in the master.'(1)

In a case of the captain's dropping anchor in the Mississippi, and going ashore to find a market for his own private adventure of negroes on board, Lord Kenyon said, 'the barratry commenced when the captain first went out of his course.'(2)

But a deviation to pursue a vessel that had been run away with by the seamen, on a compensation of a hundred pounds sterling being offered, the master having no exclusive view to his own benefit, has been held in Pennsylvania not to be barratry.(3)

It is barratry in the captain to cruise contrary to the intention and instructions of the owners. The owners of the vessel took out letters of marque merely for the purpose of inducing seamen to ship, without any intention that the vessel should cruise, and accordingly the clearance requisite by statute to authorize the vessel to cruise for prizes, was not taken out. The captain's instructions were to proceed to Liverpool with all expedition, no mention being made of the letters of marque. The captain, however, after getting out to sea, with the consent of a major part of the crew, commenced cruising, and having plundered one American vessel, after some days fell in with another prize, which he carried into Bermuda. His own vessel was there driven ashore in a storm, and the cargo was lost. Lord Kenyon said, the stopping to plunder the American vessel was barratry in the captain, 'because it was contrary to his duty to his owners; it was to the prejudice of the owners because they stipulated by the charterparty that the vessel should sail directly for Liverpool. Lawrence, J. said, 'Whatever was done by the captain to defeat or delay the performance of the voyage, was barratry in him, it being to the prejudice of his owners. When he stopped the American ship to examine and plunder her, he was guilty of barratry.'(4)

A captain took a letter of marque, with an understanding that he was to use it only for the purpose of defence. Meeting with a vessel of the enemy on the voyage, which surrendered to him without resistance, he stopped between two and three hours to take possession of the prize and put a prize-crew on board of it. This was held to be a deviation, but not barratry in the captain, as it seemed to be rather 'a mistake of his duty,' than any 'gross malversation,' and he acted by the advice of the supercargo, and also of the owner of a part of the cargo, who was on board. Chief Justice Parker, giving the opinion of the court, said that, in the above case of *Moss v. Byrom*, 'the circumstances were considered to afford an imputation of crime or fraud against the master,' in which it was distinguished from this case.(5)

A policy was made on goods for a voyage from London to Jamaica. The vessel after being carried out of her reckoning by strong currents and other circumstances was found to be between the Grand Canary and the island of Teneriffe, when the captain put into the island of Santa Cruz, which was in sight, instead of taking the course to Jamaica. The jury found that the captain's going to Santa Cruz 'was a deviation, and was owing either to ignorance or to something else, *but that it was not fraudulent.*' The court were of opinion that this was not barratry, to which they thought fraud essential.⁽¹⁾

The captain deviates without any fraudulent purpose.

(1) *Phyn v. Roy, Ex. Ass. Co. 7 T. R. 501.*

It is barratry in the captain to expose the ship to seizure by trading with the enemy. During war between England and the Netherlands, an English vessel was insured for a voyage to the coast of Africa and the West Indies. The captain being on the African coast, and not finding a good market at the British settlements, proceeded to D'Elmina, a Dutch fort, where he exchanged his cargo, consisting among other things of muskets and gunpowder, for slaves. He had a commission of letter of marque, authorizing him to capture Dutch and French vessels. His object in going to D'Elmina was to exchange his cargo as cheaply and expeditiously as he could. Besides his regular pay he was entitled to commissions on his purchases. The vessel was seized and forfeited, in consequence of this act.

Trading with the enemy.

Lord Ellenborough said, 'It has been asked, how this act of the captain in going to D'Elmina, in order to purchase his cargo more cheaply and expeditiously for his owners, is a breach of trust, as between him and them? Now I conceive the trust reposed in the captain of a vessel, obliges him to obey the written instructions of his owners, where they give any; and where his instructions are silent, he is at all events to do nothing but what is consonant to the laws of the land, whether with or without a view to their advantage. In the absence of express orders to the contrary, obedience to the law is implied in their instructions. I cannot, for a moment, suffer it to be supposed that a captain is not guilty of a breach of trust to his owners, who does an act which is injurious to them.'

He says that barratry is synonymous with fraud, both from the derivation of the word and the adjudged cases, and that it 'includes *every species of fraud* in the relation of the master to his owners, by which the subject matter insured might be endangered.'

He refers to the above cases of *Stamma v. Brown*, and *Vallejo v. Wheeler*, as showing that the circumstance of private benefit, accruing to the master, was evidence of fraud in the particular case, and not essential to barratry in all cases whatsoever. He says that Mr. Justice Buller was of opinion, that sailing out of a port, in violation of an embargo, was barratry. 'After these various decisions we are certainly warranted in pronouncing that a fraudulent breach of any duty by the master, in respect to his owners; or in other words, a breach of duty in respect to his owners, with a criminal intent, or *ex maleficio*, is barratry. And with respect to the owner of the ship or goods, whose interest is to be protected by the policy, it can make no

The captain's regard to his own interest and disregard of his owners' is not essential to barratry.

difference in the nature of the thing, whether the prejudice he suffers is owing to an act of the master, induced by motives of advantage to himself, malice to the owner, or a disregard to those laws which it was the master's duty to obey.

'It has been strongly contended that if the conduct of the master, although criminal in respect to the state, were, in his opinion, likely to advance his owners' interest, and intended by him so, it will not be barratry. But to this we cannot assent. For it is not for him to judge in cases not entrusted to his discretion, or to suppose that he is not breaking the trust reposed in him, but acting meritoriously, when he endeavours to advance the interest of his owners by means which the law forbids, and which his owners also must be taken to have forbidden, not only from what ought to be, and therefore must be, presumed to have been their own sense of public duty; but also from the consideration of the risk and loss likely to follow from the use of such means.'

'In giving this opinion we feel no apprehension that simple deviation will be turned into barratry; for unless it be accompanied with fraud or crime, no case of deviation will fall within the true definition of barratry, as above laid down.'⁽¹⁾

The master of a vessel took belligerent goods on freight, which he agreed to cover as neutral. The freight was to be paid to his owners, but he was himself to receive a *douceur* besides. Mr. Justice Yeates told the jury that this was barratry, if the master had a particular view to his own benefit; but if they supposed him to be the general agent of his owners, and to have acted wholly on their account, it was not barratry.⁽²⁾ But according to the preceding case this seems to have been barratry, with whatever views the captain acted.

It is barratry in the captain to occasion the capture of the ship by his collusion with the commander of a privateer;⁽³⁾ or to sail fraudulently for an enemy's port.⁽⁴⁾

Mr. Justice Brackenridge was of opinion, that the captain's persisting in an attempt to enter a blockaded port, after being warned off by the blockading squadron, was barratry.⁽⁵⁾

In another case, it would seem, from some expressions used by Mr. Justice Kent, that he was of a different opinion; his expressions were, however, used with particular reference to another point. Mr. Justice Radcliff, who gave his opinion at length, in the same case, said nothing on the subject of barratry; though it appears from what was said by Mr. Justice Kent, that this was one of the risks insured against in the policy. The question, as stated by Mr. Justice Kent, was, whether 'a voluntary attempt by the captain to break a blockade, be sufficient to destroy the right of recovery on the policy.' He said, 'Such an attempt takes away from the assured his right to recover; for he can never be allowed to indemnify himself upon an innocent party from the consequences of his own want of skill, or from his negligence or folly. The act of the master must be referred to his principal who appoints him, and whenever a loss happens through the master's fault, unless that fault amounts to barratry, the owner

(1) *Earle v. Rowcroft*, 8 East, 126.

(2) *Crouillat v. Ball*, 4 Dal. 294.

Collusion with the enemy; or sailing for an enemy's port.

Wilful violation of blockade.

(3) *Archangelo v. Thompson*, 2 Camp. 620.

(4) *Goldschmidt v. Whitmore*, 3 Taunt. 508.

(5) *Calhoun v. Ins. Co. of Penn.* 1 Bin. 321. See also *Everth v. Hannam*, 2 Marsh. Rep. 72; 6 Taunt. 875.

and not the insurer must bear it. It is a fault in the master to occasion a loss to the property, from his carelessness or want of competent skill; and much more is it the case, if he *wilfully* occasion that loss, as by resisting search, breaking a blockade, &c. It is a point not to be disputed that an attempt knowingly to break a blockade, is a violation of neutral duty, and occasions a forfeiture of the property, and it cannot be supposed, unless it be so expressed, that the insurer takes upon himself such risk.'(1)

(1) *Vos v. Un.*
Ins. Co. 2
Johns. Cas.
187.

Taking this case, according to the judge's description of it, to be that of an attempt *wilfully and knowingly* to violate a blockade, in consequence of which the vessel and cargo were exposed to capture and forfeiture, and were in fact captured and forfeited; it is difficult to distinguish the case from those which have been adjudged to be barratry in England, unless the ground be assumed, that the warranty of neutrality took the captain's conduct, as respects that warranty, out of the risk of barratry. If this distinction be not made between a policy containing a warranty of neutral property, and one containing no such warranty, then the whole case, as stated by Mr. Justice Kent, seems to answer very exactly to those of barratry above cited. But the case is perhaps stated more strongly by the judge than it was considered by the court, in giving their judgment in favour of the insurers, and so it seems from the testimony of the mate, as it is reported; as also from what the same judge says in other parts of his opinion, as well as from the opinion of Mr. Justice Radcliff; from which it appears that the captain did not *wilfully and knowingly* do an act which *he supposed* would be a breach of the blockade, for he expected to be warned off for the *first attempt* to enter, though he had previous notice of the blockade; he therefore appears to have done an act, which was legally a breach of the blockade, and so adjudged both in England and the United States, but which the captain *supposed*, at the time, not to amount to such a breach. This makes it a mistake, instead of a fraud or crime wilfully and knowingly committed by the captain, and if it be so considered, the case is sufficiently distinguished from those of barratry above mentioned; and is in conformity to what Mr. Justice Washington said, in another case, namely, 'that if the captain ignorantly commit a breach of blockade, or violate some foreign ordinance, the illegality of the act will not make it barratry.'(2)

(2) *Dederer v.*
Del. Ins. Co.
2 Condry's
Marsh. 534. n.

The same distinction is made in all the cases between acts done by mistake, or through want of due vigilance and prudence, and those of intended misconduct. In the case before mentioned of a vessel, partly laden with powder, being blown up by a candle's being carelessly placed, in which the loss was claimed under the risk of barratry, Chief Justice Thompson said, that 'an act, to be barratrous, must be done with a fraudulent intent. Barratry is a fraudulent breach of duty in respect to the owners.'(3)

(3) *Grim v.*
Phoen. Ins.
Co. 13 Johns.
451.

That the warranty of neutrality does not diminish or affect the risks assumed by the underwriters, under *barratry*, may be

A warranty of
neutral pro-

perty does not diminish the risks insured against under barratry.

(1) *Suckly v. Delafield*, 2 Caines, 222.

(2) *Wilcocks v. Un. Ins. Co.*, 2 Bin. 579; 2 Condry's Marsh. 534. n.

(3) *Havelock v. Hancil*, 3 T. R. 277.

(4) *Pipon v. Cope*, 1 Camp. 434.

(5) *Brown v. Un. Ins. Co. of N. London*, 6 Hall's L. J. 526.

(6) *Dederer v. Del. Ins. Co.*, 2 Condry's Marsh. 534. n. See also *Wilcocks v. Un. Ins. Co.* ut supr.

Resistance of search.

Wilfully neglecting to sail with a fair wind, and cutting the cable so as to let the ship drift upon rocks.

very directly inferred from another case decided by the same court. It was upon a policy on the ship *Ann*, 'warranted free from any charge, damage, or loss, which may arise in consequence of seizure or detention of the property, for, or on account of any illicit, or prohibited trade.' The master, without the knowledge of his owner, privately conveyed a quantity of gunpowder on board of the vessel on his own account, of which no mention was made in the log-book. The vessel was seized and condemned at St. Domingo, on account of having this article on board, which was there prohibited. The court said, 'We have no doubt on the conduct of the master; it was certainly barratry.'(1)

In an action on a policy upon goods warranted neutral, barratry being one of the risks insured against, Chief Justice Tilghman said, that 'taking the whole instrument together, he thought it most reasonable so to construe it, as to leave the insurance against barratry in full force. On this principle the warranty will imply, that as to all acts to be done by the assured themselves, or by their agents, except only such as amount to barratry, the neutral character shall be preserved.'(2)

If the captain smuggle goods without the consent of his owners, it is barratry. This was decided in an action on a policy 'upon all lawful trade,' for, said Lord Kenyon, 'the words *lawful trade*, in the policy, mean the trade in which the ship is sent by the owners.'(3) In this case the court said, the owners, having conducted with propriety, were entitled to indemnity.

But if the owners are in fault in not preventing any act of the master or mariners, though they do not directly assent to it, the act is not barratry; as in a case in which it appeared that the mariners had three times successively subjected a vessel to the danger of seizure and forfeiture, by smuggling, though without the knowledge of the owners. The loss claimed was occasioned by these seizures. Lord Ellenborough said, 'This is a clear case of *crassa negligentia* on the part of the assured. It was his duty to have prevented these repeated acts of smuggling by the crew. By his neglecting so to do, and allowing the risk to be monstrously enhanced, the underwriters are discharged.'(4)

A resistance of search, by a neutral captain and crew, when it is rightfully demanded by a belligerent, has been held to be barratry.(5) Upon the same principle the rescue of a neutral vessel detained, and sent in for examination by a belligerent, is barratry in the captain and crew, this being, in effect, a resistance of the right of search.(6)

The conduct of the captain in sailing with an unfavourable wind, contrary to the directions of the pilot, he having before refused to sail when the wind was fair; and his disregarding the pilot's instructions in other respects, though informed of the consequences; and his conduct in cutting the cable so that the ship drifted on the rocks, were considered to be acts of barratry. It was objected that there did not appear to be any fraud. Lord Ellenborough said, 'This is not necessary. It has been

solemnly decided that a gross malversation by the captain, in his office, is barratrous.⁽¹⁾

Chief Justice Thompson says, 'it is well settled that an act to be barratrous must be done with a *fraudulent intent*,⁽²⁾ as distinguished from an act done through mistake or carelessness. But negligence may be so gross as to amount to criminality or fraud. This is a general doctrine, and it is adopted by Lord Ellenborough in relation to barratry. A number of the preceding cases show this. Those which make the intentional evasion of foreign port duties barratry, cannot be supposed to turn upon the criminality of this act, as it is not, as we have seen, esteemed to be in any degree unlawful or blameable in the captain to violate foreign revenue laws. It is on the ground of fraud then. But there is no other fraud than that of knowingly exposing the ship and cargo to seizure. This is a breach of his duty to his owners, and it is no less so to expose the property to a loss by gross and inexcusable negligence. If barratry depend on the misconduct of the captain, or the degree to which his conduct is reprehensible, extraordinary carelessness may constitute barratry no less than any positive act of fraud.

'If the master, knowing the inevitable danger of capture if he proceed on his voyage, should notwithstanding continue it, and expose the vessel to certain seizure, this will be barratry.'⁽³⁾

The assured cannot recover for a loss by a barratrous act of the master done with the consent of the owner, or the person who is considered to be such, in respect of barratry; for, says Lord Mansfield, 'nothing is so clear as that no man can complain of an act to which he himself is a party.'⁽⁴⁾ In such case the act cannot be said to be done against the owner. The captain of a ship, a Frenchman, with the concurrence of one of the owners of the vessel, also a Frenchman, by means of new bills of lading, and with the design of embezzling the property, put the cargo into the hands of a person named as consignee in the new bill of lading, but to whom the goods had not in fact been consigned by the shipper. This conduct was considered to be barratry in France, but in England it was held not to be so. Lord Mansfield said, 'The point to be considered, is, whether barratry can be committed against any but the owners of the ship? It is clear beyond contradiction that it cannot. For barratry is something contrary to the duty of the master and mariners, the very terms of which imply that it must be in the relation in which they stand to the owners of the ship. An owner cannot commit barratry; he may make himself liable by his fraudulent conduct to the owner of the goods, but not as for barratry. And besides, barratry cannot be committed against the owner *with his consent*.'⁽⁵⁾

The circumstance of the captain's acting as agent of his owners, or of the shippers, in another capacity, is considered by Emerigon;⁽⁶⁾ who says, that in such case, his acts as consignee of the cargo or factor, must be distinguished from those which

(1) Heyman v. Parish, 2 Camp. 149.

Gross negligence may be barratry.

(2) Grim v. Phoen. Ins. Co. 13 Johns. 457.

(3) Richardson v. Maine Ins. Co. 6 Mass. Rep. 117, 121.

(4) Cowp. 155.

Embezzlement of the goods with consent of the ship-owners.

(5) Nutt v. Bourdieu, 1 T. R. 323.

(6) t. 1. p. 370. c. 12. s. 3. See also Casar. disc. 1. n. 75, 76.

A master may commit barratry, though he is supercargo.

he does in his capacity of captain; for it is only in this capacity that he can commit barratry.

(1) *Kendrick v. Delafeld*, 2 Caines, 67. This distinction was considered in a case decided in New York. The captain, being also consignee of the cargo insured, was supposed fraudulently to have sunk his vessel, at the island of Santa Cruz, by boring holes in her bottom. 'The fraud of the master,' said Mr. Justice Kent, 'was not committed in his character of consignee of the cargo, but in his character of master of the vessel. He could not lay aside his character and responsibility as master, until the vessel had performed her voyage, and arrived at her port of destination.'(1)

But from another case, decided by the same court upon a policy on the cargo of the schooner *Despatch*, from Havana to New Orleans, and at and from thence to New York, the captain being supercargo and consignee of the goods, it seems that he continues to act as captain in port. The cargo consisted partly of specie. On arriving at New Orleans, the captain converted the specie to his own use, abandoned the voyage, and absconded. The assured were owners of both the vessel and cargo. It was contended, in behalf of the underwriters, that 'there could not be barratry in relation to the cargo, when it was owned by the owner of the vessel, and also, that the act of the captain ought to be referred to his character of consignee. But the court said, 'This was clearly a breach of duty in his character of master of the vessel, and though he had a superadded character of consignee, the act was properly imputable to him as master.'(2)

(2) *Cook v. Com. Ins. Co.* 11 Johns. 40. Mr. Justice Kent is reported to have said, 'It is a question, whether even barratry, with the concurrence of the owners of goods, will exempt the insurer of goods belonging to an innocent shipper. The English authorities do, however, look very strongly to the opinion, that the insurer would not, in such case, be responsible.'(3) I do not know of any English authorities to this effect, nor is the position supported by the passages in *Millar*, 165, 167, and *Marshall*, 452, referred to by the judge, which makes it not improbable that there is a mistake in the report, and that it ought to be, *with the concurrence of the owners of the ship*.

(3) *Kendrick v. Delafeld*, 2 Caines, 73. The preceding cases show that theft and embezzlement are in their nature barratrous acts. If, without any fault on the part of the assured, the captain run away with the property insured, while it is at risk,(4) or purposely destroy it, this is no doubt an act of barratry, and many of the above cases proceed upon this supposition. If barratry be insured against in a policy upon the ship or cargo, the loss must in general be the damage or destruction of the subject insured. But if the freight be the subject of the policy, the loss upon this interest may, in regard to this risk, as well as others, be the consequence of the damage or destruction of the ship or cargo. It will subsequently appear that if freight be insured against sea-risks, and in consequence of the loss of the goods by those risks, the ship is prevented from earning freight; this is a loss within the policy.

Embezzlement or wilful destruction of the property by the captain.

(4) *Faulkner v. Ritchie*, 2 M. & S. 290; *Marcadier v. Ches. Ins. Co.* 8 Cranch, 39.

There seems to be no ground of distinction, in this respect, between an insurance against sea-risks, and one against barratry.

There are few cases on the subject of barratry of the mariners, though this risk is one of those comprehended in the greater number of policies. It cannot, therefore, be very definitely determined what acts of theirs will amount to barratry. The control and superintendence which the assured has of their conduct, and is supposed to exercise through the captain; and the little trust that is ordinarily and necessarily reposed in them, render the assured answerable for their conduct in a much greater degree than he is for that of the captain; and accordingly the insurers are in proportion less answerable for any breach of trust on their part, since it is the fault of the assured to repose any very great trust in them. With this distinction, an act of barratry in the mariners does not differ from the same act in the captain, and therefore where an act barratrous in its nature is done by the mariners, the insurers are answerable for a loss occasioned by it, if, with due precautions and diligence, it could not have been prevented.

In regard to petty thefts and embezzlements, the insurers are in general held not to be answerable for them, since with due vigilance and care they might be prevented. Losses of this description are usually paid by withholding the wages of the guilty parties, or of the whole crew, to the amount of the loss.

But when any crime or fraud is committed by the mariners, under such circumstances, that it could not have been prevented by the prudence and vigilance of the assured, or the captain who acts in his stead, the insurers against the barratry of the men are liable for the loss. Thus where the crew compelled the captain to change his course in one case, for the purpose of bringing in a prize,^(a) and in another, where they compelled him to return to the port of departure, from an apprehension of corsairs,⁽¹⁾ it was held that the insurers were still answerable under the policy, which shows that they were answerable for the consequences of this conduct in the crew, for unless they were so, they would probably have been held to be discharged from the risks, in these cases, on account of deviation.

Where four of the mariners conspired with some prisoners of war on board, and overpowered the master and the rest of the crew, and ran the ship ashore, it was determined to be a loss by barratry.⁽²⁾

These instances show that where the cause of the loss is a superior force, originating with the crew, the insurers are answerable. This responsibility is not limited to acts of the mariners that are accompanied with violence, for in a case⁽³⁾ in which a loss was claimed on account of the barratry of the mariners, in smuggling goods, Lord Ellenborough was of opinion

Barratry of the mariners.

The insurers are answerable for the crimes and frauds of the mariners, which could not be prevented.

(1) *Driscol v. Passmore*, 1 B. & P. 200.

(2) *Toulmin v. Anderson*, 1 Taunt. 227.

(3) *Pipon v. Cope*, 1 Camp. 434.

(a) *Elton v. Brogden*, 2 Str. 1264. See 1 N. R. 186. and Park, 142. n. whether this case of *Elton v. Brogden*, was barratry. See also Lord Mansfield's remarks upon this case in *Vallejo v. Wheeler*, 4 Cowp. 143.

that the assured could not recover, because the smuggling might have been prevented, by the exercise of proper vigilance and prudence on the part of the assured, or rather of the captain, who acted in his stead. This implies that if the act of the mariners could not have been prevented, the insurers would have been liable.

A master who is owner cannot commit barratry.

(1) *Marcadier v. Ches. Ins. Co.* 8 Cranch, 39.

(2) *Ross v. Hunter*, 4 T. R. 33; *Steinback v. Ogden*, 3 Caines, 1; *M'Intyre v. Bowne*, 1 Johns. 229.

(3) *Lewen v. Suasso Postleth. Dict. Art. Assur.*

Barratry being an act prejudicial to the owners, and done without their consent, it is plain that it cannot be committed by a master who is owner or part owner of the vessel.(1) But if there be any question whether he is owner, it belongs to the insurers to show that he is so, it is sufficient for the assured to make out the barratrous act, and the underwriters must show any thing that discharges them from their agreement of indemnity.(2)

Where the captain was general owner of the ship which he had bottomried and mortgaged, but of which he had the control and navigation, Lord Hardwicke held that he could not commit barratry, so as to give the assured on goods, a claim against his underwriters under this risk.(3)

It is held that the underwriters may take upon themselves the risk of the conduct of persons entrusted with the property by the assured. There seems to be no reason against extending the indemnity in favour of owners of the cargo, to the acts of a master who is owner, as well as to those of a master who has no interest in the ship. But to render the insurers of goods liable for losses by barratrous acts of the master, who is an owner of the vessel, would require some special provision in the policy. Under the construction of the common form of the policy, which has been adopted and uniformly preserved in England and the United States, the insurers on goods are not, under these circumstances, liable for a loss by the barratry of the master.

The charterer of the ship may be considered owner in respect to barratry.

(4) *Vallejo v. Wheeler*, Cowp. 143.

(5) *Loft*, 631.

Barratry is said to be an act prejudicial to the owners of the ship, but the charterer may be the owner for this purpose. In a case(4) cited above, Willes, the owner of the vessel, consented to the barratry. But the charterer was considered to be owner, in relation to barratry, and accordingly it was held that an act, to be barratrous, must be prejudicial to his interest, but that it was not essential that it should be injurious to the interest of any other owner; the assent of the actual owner of the vessel, and his participation in the captain's act, did not therefore prevent its being considered to be barratry. Lord Mansfield said, in this case, 'It is material whether the owners of the goods have the direction. If the ship be let as a house, then the freighter is owner, but if it be only a covenant that the ship shall go only that voyage for the freighter, then he has only the use of the vessel.'(5) It does not appear that the charterer victualled and manned the ship; or appointed the master; it seems that Brown, the master appointed by Willes, the owner, made an agreement with Darwin, the charterer, for the freight of the whole ship, for a voyage from London to Seville and back to London; and that the ship was then put up as a general ship for that voyage, on account of Darwin, the charterer; and the assured, and a number of other persons, shipped

goods for the voyage. These shippers accordingly contracted with Darwin for the freight of their goods. Darwin had the direction of the ship as to the course she should take, and the mode in which she should pursue this voyage, for which he had the entire use of the ship. This is the ownership and control of the vessel which seems, in England, to constitute the charterer owner as to barratry; it does not appear to be requisite for this purpose that he should victual and man the ship, or have the appointment of the master.⁽¹⁾

(1) *Everth v. Hannam*, 2 Marsh. 339.

It is held in England that if the entire ship be let for a voyage, the general owner cannot, under a policy against barratry, recover for a loss occasioned by an act of the captain to which the hirer consents. Hobbs, the owner of a ship, chartered her to Woodman, who agreed to pay a certain sum to the owner if she should be lost. Woodman was to have the absolute control of the ship, during the period of the charterparty. Woodman consigned the ship to Kendal, at Rio Janeiro, 'whose orders he desired the captain implicitly to obey.' Kendal being at Buenos Ayres at the time of the ship's arriving at Rio Janeiro, his partner, at the latter place, ordered the captain to proceed to Buenos Ayres. He accordingly proceeded to Buenos Ayres, where Kendal sent smuggled goods on board, in consequence of which the ship was seized and condemned. Lord Ellenborough said, 'I clearly think the loss is to be imputed to the plaintiff himself. If I give the dominion of my ship to a charterer, his acts are my acts; and in this case Kendal, whose orders the master implicitly obeyed, according to his instructions, was, in point of law, the agent of the assured. Therefore the loss arose from his own orders, and there is no pretence for imputing it to barratry.'⁽²⁾ It does not appear at whose expense the ship was navigated in this case.

(2) *Hobbs v. Hannam*, 3 Camp. 93.

Soares and his partner, of London, agreed with the captain and owner of a Portuguese brig, to carry a cargo of flax and hemp from London to Figueira, and proceed thence with such cargo as the captain might choose to take on his own account to Pernau, in Russia, and there to take on board for Soares and his partner a hundred tons of flax for Oporto, and to give them the preference as to taking on board other goods sufficient to load the ship. The ship sailed from Pernau with a cargo belonging wholly to Soares and his partner, and in the course of the voyage the captain purposely run her on shore, whereby the cargo was greatly damaged. The vessel appears to have been manned, victualled, and navigated by the owner, and not by the freighters. In regard to a claim upon the insurers of the goods against barratry, Chief Justice Gibbs said, 'The objections are that the owner being on board of the vessel, and having acceded to the act of running her on shore, it could not assume the character of barratry. Barratry being an act of fraud against the owner of the ship, if he agree with the captain to the commission of that act, it cannot be barratry as against him, for his own concurrence thereto precludes it. There was only one period of the voyage in which the owner could exer-

cise the right of loading the brig; he might freight the vessel from Figueira to Pernau, but he did not do so. At Pernau the assured, as freighters, completely loaded the vessel. The owner's right to interfere, therefore, was completely at an end. Such being the case, the freighters had the exclusive control of the vessel from that period. Although the loss happened by the connivance of the original owner, such loss would amount to barratry, as it was committed without the concurrence of the freighters, who had a full cargo on board. This therefore is a loss by barratry.'⁽¹⁾

(1) *Soares v. Thornton*, 1 Moore, 373.

Mr. Justice Story, giving the opinion of the court, says, 'Barratry may be committed against a person who is owner for the voyage, although he may not be general owner of the ship. A person may be owner for the voyage, who by a contract with the general owner, hires the ship for the voyage, and has the exclusive possession, command, and navigation of the ship. Where the general owner retains the possession, command and navigation of the ship, and contracts to carry a cargo on freight for the voyage, the charterparty is considered as a mere affreightment grounding in covenant, and the freighter is not clothed with the character or legal responsibility of ownership.' Accordingly it was the opinion of the court, that the case then under consideration, was not a case of barratry, because 'the master, who was general owner, retained the exclusive possession, command and management of the vessel, and she was navigated at his expense.'⁽²⁾

(2) *Marcardier v. Chesapeake Ins. Co.* 8 Cranch, 39. See also *Hoos v. Groverman*, 1 Cranch, 214.

It was verbally agreed that the master should have the control of a vessel, from November to May, and victual and man her at his own expense, but the owners were to defray the expense of repairs. For the use of the vessel during this time, the master was to pay over to the owners, one half of her earnings. It was held that this agreement made the master the owner of the vessel as to barratry; and accordingly that 'the offence of barratry could not be committed by him.'⁽³⁾

(3) *Taggard v. Loring*, 16 Mass. Rep. 336.

In a case decided in New York, *M'Intyre*, the assured, and owner of a vessel, let her to freight to Aiken and Brice, for a voyage from New York to Trinidad and back, with liberty to touch at Curraçoa, 'excepting one half of the cabin, the privilege for twenty barrels for the master and mate, and so much of the hold and forecastle, as was necessary for the accommodation of the master and crew, provisions,' &c. *M'Intyre* effected insurance on the vessel for the same voyage. Brice acted as supercargo. While the vessel was proceeding on her return from Trinidad towards Curraçoa, the master, at the request of Brice, and on being promised one hundred dollars with indemnity to himself and his owners, changed his course and went to a port on the Spanish Main. A loss afterwards occurred, which was claimed under the risk of barratry. Mr. Justice Thompson, in giving the opinion of the court, said, 'The right of the assured to recover will depend on the determination of the question, who is to be deemed owner of the vessel for the voyage. I should not consider Aiken and Brice as owners for the voyage. I apprehend the distinction to be, that where, by the

terms of the charter, the ship-owner appoints the master and mariners, and retains the management and control of the vessel, the charter is rather to be considered a covenant to carry goods; but where the whole management is given over to the freighter it is more properly a hiring of the vessel for the voyage,⁽¹⁾ and in such case the freighter would be considered the owner *pro hac vice*.

(1) *M'Intyre v. Browne*, 1 Johns. 229.

In a case under a policy upon goods, a loss was claimed for barratry of the master, who hired the ship of the owners at a certain sum per month, the owners agreeing to keep the vessel in repair, and she was to be at their risk; but the captain was to victual and man her. The captain embezzled the cargo. The court said, 'The master was to be considered owner *pro hac vice*, or for the voyage insured. There was a complete letting of the entire vessel for the voyage. He had the whole management and control.' And it was adjudged not to be barratry.^(a)

It appears very distinctly from the preceding cases that, in England, to constitute the freighter owner, as to acts of barratry, it is sufficient that he has the use and control of the ship for a certain voyage or time; but it is not necessary for this purpose that the ship should be fitted out, manned, and navigated at his expense, or that he should have the right of appointing the master. The principle of these cases seems to be this; if the charterer has such a use and control of the ship, that he may agree with any person to take goods, the freight of which would be due to him, and not to the general owner, the charterer is, under these circumstances, the owner as to acts of barratry.

But the cases decided in the United States do not seem to make the character of ownership of the vessel depend upon the same principle. The judges, in giving their opinions, lay great stress upon the circumstance of the vessel's being navigated at the expense of the charterer; and in some of the cases, this circumstance appears to be considered as essential in order to constitute the charterer owner, in relation to barratry. The principle apparently assumed in the American cases, is, that if the ship is let upon such terms that the captain, as such, and in his general conduct in the navigation of the ship, is to be considered the agent of the charterer, the charterer is, under these circumstances, the owner in relation to barratry.

In regard to the English cases upon this subject, it seems difficult to distinguish, in principle, between the hiring of a part of the ship, and the hiring of the whole, for a particular voyage. The control which the charterer is required by those cases to have of the ship, in order to constitute him owner as to barratry, seems to be, at most, only the right of giving directions as to the mode of prosecuting the voyage. In some of the cases he does not appear to have this right, nor to have any choice or discretion, as to the kind of goods that may be shipped.

(a) *Hallet v. Col. Ins. Co.* 8 Johns. 209. And a charterer having the absolute control is the person answerable to the shipper of goods, and not the general owner. *James v. Jones*, 3 Esp. 27.

Such a charterer can hardly be distinguished from one of the freighters of goods on board of a general ship. It seems therefore to be scarcely stepping beyond the principles upon which those cases are decided, to hold that the assured, whether on ship or goods, is himself the only owner to whose interest a fraudulent act of the captain must necessarily be prejudicial, in order to render it an act of barratry. Unless this construction is adopted, it seems to be necessary to stop at the principle which runs through the American cases, and to hold that only those fraudulent acts of the captain are barratrous, which are against the interest, and done without the consent of the person whose agent the captain is, and who, upon the general doctrine relating to agent and principal, is responsible for the conduct of the captain in navigating the ship, and who would be bound by the contracts of the captain, as far as his authority, in that capacity, empowers him to bind his principal.

(1) 8 East,
134; 8 Johns.
213; 2 Johns.
Cas. 188;
2 Condry's
Marsh. 534. n.
(2) 1 T. R.
330.

It has been thought singular that insurers, who have not the appointment or control of the captain, and who often do not know him, should stipulate to make indemnity for his frauds and misconduct to the assured, whose agent he is, and who in case of insurance on the ship, may dismiss him when they please. (1) 'It is strange,' says Lord Mansfield, 'that barratry should ever have crept into insurance.' (2) But what is there strange in the merchant's wishing to secure himself against the risk of the dishonesty of the master, for though he secure himself as well as he possibly can against all the risks of trade, except that of the markets, still there are many left for him to run, and it is natural that he should wish to diminish the number, as his whole fortune is often at hazard. Nor does it seem remarkable that insurers should be willing to take this risk, provided they receive an adequate premium. Courts have often said they would not extend the construction of barratry, that is, that they will give the contract a narrower construction than they might perhaps do, if they thought it expedient, and on the whole advisable and useful to comprehend this among the risks commonly insured against. It seems to be questionable whether this consideration ought to have much influence in limiting the construction of a contract. The parties themselves generally have better means of forming an opinion respecting considerations of this description, and their interest makes them sufficiently vigilant and active in availing themselves of the means they possess to judge of the expediency of subscribing to stipulations, of the practical operation of which they cannot be ignorant. The reasons urged to show the inexpediency of insuring against the barratry of the captain, apply with very little force to policies on goods where the assured is not owner of the ship, since the captain is often, and probably in the greater number of instances, as well known to the insurers as to the assured; and though he is to some purposes the agent of the assured on goods, yet they have no more direct control of his conduct, than the underwriters have. Accordingly, some underwriters make a distinction between policies on the ship, and those on the cargo, and insure

against barratry only in the latter, and not in these, if the assured is owner of the ship as well as the goods.

Section 3. *The Insurers are not liable for Ordinary Perils or Losses.*

Whatever risks are assumed by the underwriter, his liability is subject to two limitations; he is not liable for the consequences of the perils assumed, except when they operate in an extraordinary degree, and he is liable only for loss and damage of an extraordinary kind. Mr. Justice Thompson says, 'The insurer undertakes only to indemnify against the extraordinary and unforeseen perils of the sea, not against the ordinary perils to which every ship must be exposed in the usual course of the voyage.'⁽¹⁾

(1) *Barnewall v. Church*, 1 Caines, 234

The peril of capture is not subject to degrees, but is always considered to be extraordinary, and in all cases gives the assured the right of abandoning and claiming for a total loss. But perils of the seas may be ordinary or extraordinary, and so may their effects; and unless the degree of a peril and its effect be both extraordinary, the assured has no claim for indemnity. Although the action of the winds and waves may by degrees destroy and wear out the hull and rigging, and sails of the ship, yet this is not the kind of loss for which indemnity is stipulated.

Though the operation of a peril insured against is extraordinary, if its consequences are not so, it is not a loss within the policy. Stranding is an extraordinary incident, arising from perils of the seas, yet if its consequences are not so, the assured has no claim against the underwriters. In a case of a ship's being strained, and accordingly weakened, and injured in consequence of stranding, Mr. Justice Baldwin said, 'Invisible, uncertain, and conjectural damages are never the subject of remuneration. I apprehend the injury is not the subject of adjustment, unless it be capable of repair in the ordinary course of business.'⁽²⁾

(2) *Sage v. Middletown Ins. Co.* 1 Connect. Rep. 239.

But what is to be considered ordinary, and what is extraordinary in the degree and effects of the perils insured against, is a question of much difficulty, and one that cannot be very definitely settled. It is sufficient for the present to have stated the doctrine generally; the illustrations of it, and its application to particular cases, will be more fully considered in treating of the different perils insured against, and of losses.

Section 4. *Damage arising from the Qualities or Defects of the Subject.*

From the enumeration already given of the perils usually insured against, it appears that the insurers undertake to make in-

demnity only for damage arising from external accidents, not for that occasioned by the qualities or defects of the thing insured. Policies contain a provision that the insurers shall not be liable for any loss upon certain enumerated articles, unless it amounts to a certain rate per cent. The articles to which this provision relates are those most subject to damage and decay from their internal qualities. But independently of this provision, it is a general rule that the insurers are not, under the common form of the policy, liable for any damage or loss arising from the qualities or defects of the subject insured since these are not among the perils assumed by the underwriter.(1)

(1) Poth. n.
66.

Hemp was insured from London to the coast of Devonshire. While the vessel lay near Torbay a fire broke out in the hold during the night, by which the greater part of the hemp was consumed. The origin of the fire could not be discovered. Lord Ellenborough said, 'If the hemp was put on board in a state liable to effervesce, and did effervesce and generate the fire; upon the common principles of insurance law, the assured cannot recover for a loss which he himself has occasioned.' But in this case, there being no proof that the fire originated from this cause, the insurers were held to be liable.(2)

(2) Boyd v.
Dubois, 3
Camp. 133.

The underwriters are not liable for the waste occasioned by ordinary leakage, since it arises from the qualities of the article. But what is ordinary and what is extraordinary leakage, depends upon the nature of the article, and the length of the voyage.(3) Some insurance companies publish rules on this subject in respect to particular articles, which rules are thereby made a part of the contract between the parties.(a)

(3) 2 Val. 83.
h. t. a. 31.

(a) The rules of the Petapco Insurance Company in Baltimore, published in 1814, provide that, 'in cases of partial loss on liquids, ten per cent ordinary leakage shall always be deducted.' But since, on account of the memorandum in its policies, this company is rarely liable to a loss of this kind, it is not important what rule is adopted; and the purpose of the company in adopting this rule is probably only that of having an easy and ready method of adjusting the few losses of this description which come within the conditions of the policy. Where the parties propose an indemnity for losses on articles of this description upon the principles applicable to losses on goods generally, it is evident that any uniform rule of deducting a certain rate per cent for ordinary leakage, would be liable to objection, on account of its unequal and irregular operation. The forms of policies at present in use in Boston contain no exception relating to liquids, nor is there in that place, in respect to such articles, any exception, in practice, to the usual principles of adjusting losses. The practice is to ascertain in each particular case what amount of leakage is to be attributed to ordinary causes or the fault of the assured or his agents. In doing this, the season of the year; the kind of article; the description of vessel in which it is contained; the length of the particular passage; the situation of the cargo on arrival, in respect to stowage; are all taken into consideration. In some articles brought from warm climates a considerable deficiency is occasioned by the mere difference of temperature. In such cases an allowance of a certain per cent is made for *shrinkage*. The

It appears from what has been before said, that the mere fact that the damage from leakage or breakage is more than ordinary, does not necessarily give the assured a valid claim against the underwriters, since it must appear, either from the kind and degree of damage or otherwise, that it has been occasioned by some extraordinary accident.

Mr. Stevens⁽¹⁾ says, 'According to the custom at Lloyd's, articles subject to leakage are free from average, unless it can be shown that the ship has struck the ground with such force, as to make it probable that she has thereby deranged her stowage. It is the same with regard to earthen ware and things liable to breakage.' The force of the custom at Lloyd's, in respect to such articles, is accordingly equivalent, or rather it is more than equivalent, to the memorandum in the policy, whereby the insurers are exempted from particular average on certain articles, unless the ship be stranded. But this rule does not appear to be adopted generally in the United States. Some few American policies contain an express exception in regard to liquids, which makes the principles of adjusting a loss upon them the same that are adopted at Lloyd's, without any provision in the policy for this purpose.

Upon the principle that the underwriters are not answerable for damage arising from the qualities of the thing insured, a loss of slaves who die from despair, on account of the failure of a mutiny, or from any other cause, has been considered not to be a loss by the perils insured against.^(a)

In the case of an insurance of animals against the usual perils, the insurers are considered not to be answerable for loss by disease and natural death.⁽²⁾

(1) Part 3.
a. 1.

(2) 1 Emer.
393. c. 12.
a. 9.

Section 5. Events which Enhance the Risk.

It is another general rule which applies to all the risks assumed by the underwriters, that they continue liable for losses by the perils insured against, although those perils are greatly enhanced by events which the assured could not prevent, that take place subsequently to the date of the policy. If the ship is delayed upon the voyage, without any fault of the assured or his agents, and not by any cause which makes the delay a deviation, the insurers will still be liable, though the delay may subject the underwriter to a winter risk, instead of a summer

usual method is to compare the leakage in the particular case, with the leakage on the same article in other vessels, which have performed the voyage at about the same time. It is said that there is not found to be any great difficulty in this mode of adjusting losses upon such articles.

(a) Poth. n. 66; 2 Val. 55. h. t. a. 11; Tatham v. Hodgson, 6 T. R. 656. Emerigon never introduces this subject of the insurance of slaves without expressing his horror of the practice of treating a being possessed of moral perceptions, human affections, and a mind and soul, as a mere piece of merchandise.

- (1) Vallance v. Dewar, 1 Camp. 503.
 (2) Planché v. Fletcher, Doug. 251 ; Saltus v. Unit. Ins. Co. 15 Johns. 523.

risk, for which only he would have been liable, had there been no delay of the voyage.(1)

If capture is one of the risks insured against, and after the policy is made, the risk of capture is greatly increased by the breaking out of a war, still the underwriter is liable. The risk of a declaration of war is one of those which he assumes.(2)

Section 6. Loss by Fire.

The risk of fire is one of those which are specifically insured against in a policy of the common form. A loss by fire, like a loss by capture, is in its kind extraordinary. The liability of the insurers for a loss of this description, is subject only to those exceptions which are applicable to all the perils usually insured against. The assured is entitled to indemnity for such a loss, unless it happen from the qualities or defects of the subject insured,(3) the fault of the assured, or the master and crew, or other agents, for whose conduct he is answerable,(4) or by the direct or indirect operation of some peril, for the consequences of which the assured is himself answerable.

- (3) Boyd v. Dubois, 3 Camp. 133.
 (4) 1 Emer. 434. c. 12. s. 17 ; Grim v. Phœn. Ins. Co. 13 Johns. 451.

The ship is burnt from fear of its causing a pestilence.

- (5) Targa, c. 56 ; Casar. disc. 121. n. 12 ; 1 Emer. 434. c. 12. s. 17.

Case of the ship being burnt by lightning, or in an engagement.

Case of the ship being burnt to prevent its falling into the hands of the enemy, or of pirates.

- (6) Poth. n. 53.

- (7) Loccenius de Jur. Mar. l. 3. c. 9 ; Kuricke quaes. 29.

- (8) 2 Val. 75. h. t. a. 26.

- (9) Weskett tit. Fire. n. 6.

A case is mentioned of the loss of a Dutch ship, which was burnt by the Spaniards at Majorca, from an apprehension that it was infected, and might cause a pestilence. The insurers paid the loss without difficulty, considering the risk of this apprehension and alarm, as one for which they were answerable. It appeared that the loss was not occasioned by any fault of the master and crew.(5)

The insurers are answerable for the loss, where the property is consumed by lightning, or takes fire in an engagement with another vessel,(6) provided the vessel to which the insurance relates does not, by entering into the engagement, exceed the liberty given by the policy, and the fire is not occasioned by the fault of the master or mariners.

It was formerly made a question, whether the master and mariners are justified in setting fire to the property to prevent its falling into the hands of an enemy.(7) Valin is of opinion that the insurers are liable for the loss in such case, if there was no other way of preventing the property from falling into the hands of the enemy, or of pirates ; and he cites the decisions of three several courts in France in support of his opinion.(8)

Weskett thinks that the insurers are not liable for a loss of this description, except in a case where the lives of the master and crew would be in danger, were they to fall into the hands of the enemy or pirates, by whom they are pursued, and the ship is burnt for the purpose of facilitating their escape. The reason he gives is, that the property might be recaptured, and the loss be diminished by the amount of salvage.(9) But this reason does not show that the insurers ought to be wholly exempted from the loss ; it only goes to show, at most, that what would be the net amount of the salvage in case of recapture, ought to be deducted from the amount of a total loss, or else,

that the insurers ought to be answerable only for the amount to which the recaptors would be entitled for recovering the property, supposing the loss, in such case, to be adjusted as an average.

Lord Ellenborough was of the same opinion with Valin on this subject. Under a policy on the commissions and privileges of the captain on a voyage from Bristol to the coast of Africa, and thence to the West Indies, the vessel being chased by a French privateer of greatly superior strength, after an unsuccessful attempt to escape, was burnt by the captain and crew to prevent her falling into the hands of the enemy. Lord Ellenborough said, 'The case is new, but I am clearly of opinion that the assured is entitled to recover. Fire is expressly mentioned in the policy as one of the perils against which the underwriters undertake to indemnify the assured; and if the ship is destroyed by fire, it is of no consequence whether this is occasioned by a common accident, or by lightning, or by an act done in duty to the state.'⁽¹⁾

The insurers have in one case been held to be liable for the loss of a ship burnt by the negligence of the mate, who was left in charge of her.⁽²⁾ But this decision seems to be against the current of authorities upon this subject.

(1) *Gordon v. Rimmington*, 1 Camp. 123.
(2) *Busk v. Roy. Ex. Ass. Co.* 2 B. & A. 73; Supr. 228.

Section 7. Perils of the Sea.

Under perils of the sea, which constitute a part of the risks in almost every marine policy, are comprehended those of the winds, waves, lightning, rocks, shoals, running foul of other vessels, and in general all causes of loss and damage to the property insured, arising from the elements, and inevitable accidents, other than those of capture and detention.⁽³⁾

Where a vessel being mistaken for an enemy was fired into and sunk, some of the judges of the King's Bench thought this a peril of the sea, and the other judges, though they thought it not a peril of this description, yet were of opinion that the assured were protected against it by the general words of the policy, whereby indemnity is stipulated against all misfortunes and losses.⁽⁴⁾

Damage of the ship occasioned by her taking the ground when the tide left the harbour, was held to be a loss by perils of the sea.⁽⁵⁾

But insurers against these perils were held not to be liable for the damage to a ship which was bilged by being hove out to repair, not being strong enough to bear the strain;⁽⁶⁾ nor in case of the shoals being knocked away by the tide.⁽⁷⁾

If the ship or goods be damaged by collision, or the ship's running foul of another or being run foul of, without any fault of the master or mariners, the loss is considered to be occasioned by perils of the sea, and the insurers must make indemnity. And so if vessels moored in port, or their cargoes, are injured by their beating against each other, during a violent

(3) *Marsh.* 487.

Damage by the ship being fired into through mistake.

(4) *Cullen v. Butler, Park*, 105; 1

Starkie, 138.

(5) *Fletcher v. Inglis*, 2 B. & A. 315.

(6) *Rowcroft v. Dunsmore*, 3 Taunt. 228.

Damage by running foul.

(7) *Thompson v. Whitmore*, 3 Taunt. 227.

(1) Poth. n. 50; Ord. Copenh. a. 14; 2 Mag. 337; 1 Emer. 411. c. 12. s. 14; Buller v. Fisher, 3 Esp. 67.

The insurers are liable if the ship is run foul of by the fault of the crew of another ship.

storm and without any fault of the master, or mariners, or other persons having charge of the property, it is a loss by the perils of the seas. The ordinances of different countries contain many provisions, and the earlier treatises abound in elaborate disquisitions upon this subject, which it would be useless to repeat.(1)

In case of injury from this cause, the only objection to be made to the payment of the loss, is, its being occasioned by the fault of the master or crew of the ship insured, or on board of which the goods insured are shipped, for if it happen, through the negligence of the master or crew of another vessel, the insurers are held to be liable. This was decided in England, in an action upon a policy on the ship *Helena* from Honduras to London, which was run foul of at sea by the *Margaret*, through the grossest neglect of the master and crew of this latter vessel, of whom only one man was on deck, and he was asleep. The insurers objected to paying the loss on this account. Chief Justice Mansfield said, 'I do not know how to make this out not to be a peril of the sea. What drove the *Margaret* against the *Helena*? The sea. What was the cause that the crew of the *Margaret* did not prevent her from running against the other? their gross and culpable negligence—but still the sea did the mischief.'(2)

(2) Smith v. Scott, 4 Taunt. 126.

A missing ship is presumed to have been lost by perils of the seas.

(3) Green v. Brown, 2 Str. 1199; Newby v. Read, Park, 106; Twemlow v. Oswin, 2 Camp. 85.

(4) Gordon v. Bowne, 2 Johns. 150.

If a vessel at sea is not heard from for a long time, she is presumed to have perished by perils of the seas.(3) By some policies it is provided that if the vessel is not heard from for a certain time, she shall be presumed to have been lost. But if the policy contains no provision of this sort, the length of time which will be the ground of this presumption, will evidently be greater or less, according to the length of the voyage, and other circumstances.(4)

In regard to damage by rats and vermin, it seems to be implied by the expressions of judges in some instances, that it does not arise from the kind of perils insured against. But the opinions respecting the liability of the insurers for this species of loss, are most frequently put upon the ground that it is not an extraordinary loss, and also, that it happens through the fault of the assured.

Damage by rats.

A case was decided in the time of Chief Justice Lee, respecting a claim of damages for the injury done to goods by rats. The goods were injured in this manner while they were in the possession of a hoy-man, for the purpose of being transported from one port to another in England. It was held that the hoy-man was answerable for the damage, upon the principle that this was not a loss by an *act of God or the king's enemies*, and the hoy-man was answerable, as a common carrier, for damage of the goods arising from every other cause.(5) But as the master of a vessel for a voyage at sea, is not, within the meaning of this case, a common carrier, the principle upon which the decision was made is not applicable to marine insurance.

(5) Dale v. Hall, 1 Wils. 281.

According to the old books and sea-laws, the owners of the ship are not liable for damage to the goods from this cause, provided the captain takes a cat on board, at the beginning of the voyage. This supposes that the loss may be inevitable, and

that it is not in all cases owing to the negligence of the master and crew.

Emerigon⁽¹⁾ considers the insurers not to be answerable, in general, for this sort of damage, because it might be prevented by proper care. He cites many authors as being of his opinion, who all seem to adopt the principle of the old sea-laws, that the owners of the ship are answerable for this damage, unless the captain provides against it. To this effect they cite the rule of the Civil Law, that if cloths entrusted to a fuller are injured by mice, while in his possession, he must make good the damage.⁽²⁾ Straccha⁽³⁾ considers the insurers not to be liable for damage by rats or mice, on the ground that it might be prevented by proper care and diligence.

A case on this subject came before the Supreme Court of Pennsylvania, upon a policy on a vessel at and from St. Domingo to the United States. After sailing, she proved to be leaky, and was compelled to put back to Cape St. François, where, on a survey, the timbers were found to have been very much injured by the rats. The case was elaborately argued on both sides. It was the opinion of the court that this was among those casualties comprehended under perils of the seas, and for which the insurers are liable.⁽⁴⁾

A similar case came before Lord Ellenborough. Goods being insured for a voyage from London to Honduras, the vessel, in the course of the voyage, was detained at Antigua by the sickness of the crew, and while she lay there, the rats ate holes in her transoms and bottom, whereby she was rendered incapable of proceeding upon the voyage, and the cargo was sold at Antigua. Lord Ellenborough held that this did not constitute a loss, for which the underwriters on the goods against perils of the seas were liable.⁽⁵⁾

It has been held that the destruction of the vessel's bottom by worms is not a peril of the sea. A case came before Lord Kenyon relating to a vessel so destroyed on the coast of Africa. A special jury were of opinion 'that this was not a loss within the term of perils of the sea, in policies of insurance; and Lord Kenyon was of this opinion.'⁽⁶⁾ Mr. Justice Livingston, alluding to this case, said, 'I do not mean to be understood as subscribing to the opinion of Lord Kenyon.'⁽⁷⁾ But his opinion has been adopted in Massachusetts. A ship's bottom was injured by worms during the time of her detention by an embargo at Cape St. François. In respect to a claim of indemnity from the insurers for this damage, the court, speaking of the case of *Rohl v. Parr*, said, 'it was decided upon the ground that the loss was like the wearing and natural decay of the vessel.'^(a)

Some persons, conversant in the practice of insurance, consider insurers to be exempted from liability for this species of loss, on the ground that it arises from the fault of the assured. It is a kind of injury which occurs only in warm climates, and

(a) *Martin v. Salem Ins. Co.* 2 Mass. Rep. 429. In a common printed form of policy used in Charleston, S. C. it is provided that the insurers shall not be answerable for this species of damage.

(1) c. 12. s. 4.

(2) D. 19. 2. 13. 6.

(3) de assec. 817. Part 4. n. 31.

(4) *Garrigue v. Cox*, 1 Bin. 592.

(5) *Hunter v. Potts*, 4 Camp. 203.

Damage of the ship by worms.

(6) *Rohl v. Parr*, 1 Esp. 444.

(7) *Depeyster v. Col.* Ins. Co. 2 Caines, 85.

they say that a ship is not fit to be employed in those climates, unless she is secured by a copper sheathing against this kind of damage. But a distinction has been suggested, in this respect, which seems to be very reasonable, upon the supposition that the underwriters are exonerated from this risk, upon the ground above mentioned. It is suggested that if the copper sheathing be torn off by stranding, or other perils of the seas which are insured against, and in consequence of this accident the vessel's bottom is eaten by worms, the insurers are liable for the damage, upon the principle which makes them liable for loss by theft after a shipwreck, though they are not, under ordinary circumstances, answerable for such a loss.

In regard to perils of the sea, there rarely occurs any doubt whether any particular risk does or does not come under this description. The question relating to the *kind* of peril is in most instances easily determined; but it is frequently difficult to distinguish what *degree* of the peril brings it within the stipulation of indemnity; for, as we have already seen, the insurers only stipulate to make indemnity for the extraordinary consequences of the unusual and extraordinary operation of these perils. The perils of the sea include more especially the danger from the winds and waves; yet the underwriters are not understood to promise indemnity for the ordinary injury and gradual wearing out of the sails and rigging, by the constant action of the elements. Injuries and waste of this sort must be repaired at the expense of the owner, who is at the risk of the loss and diminution in value, occasioned by use and natural decay.

Delay at a port in the course of the voyage, on account of perils of the seas.

(1) Everth v. Smith, 2 M. & S. 278.

The expense of going out of the course of the voyage to refit is borne by the insurers.

The rule as to expense of wages and provisions in such case.

The expense and loss attending a mere detention and delay, on account of perils of the seas, at a port in the course of the voyage, must be borne by the owner of the ship, though the delay continues for a long time. On a voyage from a port in the Baltic to London the ship was unexpectedly detained by the ice, and instead of proceeding on the voyage immediately, could not sail until the following season. This was considered to be one of those ordinary inconveniences and interruptions of the voyage, the expense of which must be borne by the owner.⁽¹⁾

But if the vessel go out of the course of the voyage for the purpose of refitting and repairing damage sustained from the perils insured against, it is universally held that this is to be done at the charge of the insurers. But though the delay and departure from the course are considered to be extraordinary occurrences, for which the insurer is bound to make indemnity, a distinction is made between what is ordinary in the expense and damage occasioned by the delay, and so to be borne by the owner of the vessel; and what is extraordinary, and for which the insurer is answerable. The owner loses the earnings of the vessel during the time of her detention, but it is universally agreed that he has no claim against the insurer on this account.

In regard to the expense, on account of the wages and provisions of the crew, during the period of voluntary departure from the course, and delay, for the purpose of refitting, the rule practised upon in the United States, and sanctioned by all the Ame-

rican courts, is different from that adopted in Great Britain. In one case,⁽¹⁾ in which the ship put into Nice in distress, where the captain discharged the crew and then hired them to assist in repairing the ship, the court in England considered their wages, while so employed, as constituting a part of the loss within the policy, upon the ground that 'they did not work as sailors, but as common workmen.' But the expense of wages and provisions of the crew, as such, during a delay to repair, is very distinctly and explicitly considered in practice,⁽²⁾ and held by the courts in England, to be a charge upon the owner, and not a part of the loss within the policy, either upon the ship or freight.

It seems that formerly some insurers in England were of a different opinion,⁽³⁾ and on the continent of Europe these charges appear to be more generally considered a part of the loss within the policy, in case of a vessel's putting into a port to refit; though some writers doubt the propriety of this rule. Adrian Verwer says, 'Why should the victualing and men's wages be deemed a general average any more than the interest of the money, and the damage caused to the cargo by the delay?'⁽⁴⁾ The French Code makes the insurers liable for this charge only in case of the vessel's being chartered by the month.⁽⁵⁾

In the United States the rule is general and uniform, that the underwriters are in this case liable for the expense of wages and provisions.⁽⁶⁾ One reason of the rule seems to be the extraordinary circumstances under which this expense is incurred, which may be supposed to change the nature and character of these expenses, and to render the insurers liable for them upon the same principles on which they are liable for any loss. If the loss is paid upon this ground it shows that the construction put upon these expenses, as being ordinary and like the wear and tear and decay of the vessel, or otherwise, is different in England and the United States. But supposing these expenses not to be considered in the United States of the kind for which insurers are liable, according to the general principles by which their liability is usually determined, still there is a reason for making an exception in this case. A vessel quits her course to refit, that she may prosecute the voyage with greater safety, and it is evidently for the general interest of the insurers as well as the assured, to remove, as much as possible, every discouragement to the use of precautions and all practicable means for the safe prosecution of the voyage, and insurers may upon this ground assume a liability for these expenses.

The liability of the insurers for wages and provisions in case of detention seems to be very similar to the same charges in case of delay for the purpose of refitting, as far as this liability depends upon the extraordinary circumstances under which the expense is incurred, since a detention by capture, or an embargo, is as extraordinary, and as much out of the usual course of things, as a delay to refit. These two cases are considered

is different in England and the United States.

(1) *Da Costa v. Newnham*, 2 T. R. 407.

(2) *Stevens*, c. 1. a. 2. s. [e]; *Plummer v. Wildman*, 3 M. & S. 482.

(3) *Beawes*, tit. Salv. aver. &c. v. 1. p. 157. 1 Mag. 67. s. 57.

(4) 1 Mag. 68.
(5) *Cod. de Com.* l. 2. t. 11.

In the United States the wages and provisions are in such case held to be a part of the loss.

(6) 4 Mass. Rep. 548; 8 Johns. 307; 2 Caines, 263; 2 Caines, 274.

(1) *Cod. de Com. ut supr.*

What damage to the ship constitutes a loss within the policy.

(2) *c. 1. p. 52. s. 51.*

similar in the Marine Law of France.(1) The liability of the insurers for this expense will be considered subsequently.

In regard to damage to the ship, Magens says,(2) 'Were insurers obliged to pay for every cable and rope that breaks, or for every sail that splits, or blows to pieces, there would be no other way of insuring ships, but free of all particular average.'

Where a vessel is wrecked; or damaged by stranding; or rolls away her masts in a rough sea; or has them carried away in a gale; there is no question of the liability of the underwriters. So if to escape from some imminent peril that is insured against, it is necessary to cut away the mast, or cut a cable, or throw overboard a part of the cargo, the circumstances and the sacrifice being extraordinary, constitute a valid claim for indemnity. But if a cable is worn off while the vessel lies at the usual anchoring place, and without any extraordinary action of the perils insured against, or if a sail is split in the ordinary course of navigation, it is the owner's loss.

It is difficult to give examples by way of illustrating the distinction of what is ordinary from what is extraordinary, in losses and damage of this description, without getting upon disputed ground. But the only satisfactory mode of illustrating this distinction is by instancing actual adjustments of losses; since the common usage and understanding among practical men, is undoubtedly the best authority upon this subject. It ought however to be considered that insurers, from a disposition to construe the policy liberally in favour of the assured, frequently pay losses for which they do not suppose themselves to be liable in law. Actual adjustments of losses should therefore be instanced with some allowance in favour of the underwriters; a liberal proceeding on their part ought not to be converted into a strict rule against them.

Damage of the body of the ship.

In some instances, as where the timbers of the ship are broken, the damage done is a sufficient proof of the extraordinary degree of the operation of the peril. It can in general be pretty satisfactorily determined whether an injury to the body of the ship is a proper subject of indemnity; the question of most frequent occurrence in regard to such damage being, whether the extent of the injury does not rather prove the ship to have been unseaworthy, than that the peril was extraordinary. But if it be assumed that the ship was seaworthy, it is in general not difficult to determine whether an injury of this kind is a loss within the policy.

Damage of the sheathing.

It is sometimes a subject of doubt whether the damage of the sheathing is to be repaired at the expense of the insurers. The sheathing will necessarily be destroyed and worn off by use, and damage of this sort ought to be considered ordinary, and fall upon the owner, except in cases of the vessel's striking, or where some other injury, sustained by the vessel at the same time, shows that she was exposed to great violence. Injuries of this sort, which are to be considered only the wear and tear of the ship, are distinguished from those which constitute a loss within the policy, by taking into consideration the age and

strength of the sheathing, and all other circumstances, which show to how great a degree of violence the vessel has been exposed.

The damage to the upper-works of the vessel is frequently the subject of particular average, and would be more frequently so, did not the amount of this species of damage often come within one of the exceptions of the policy. If any part of the upper-works is carried away, or broken in such a manner as make a specific injury, which is the proper subject of repairs, it is always considered a loss within the policy, unless it falls within the exception of losses under three or five per cent.

Damage to the upper-works of the ship.

The same rule applies to the masts and spars. If a mast is sprung, or if spars are carried away or broken, the fact of their being so, is usually considered a sufficient proof of a degree of violence against which the insurers undertake to make indemnity.

Damage of masts and spars.

The boat is considered, to the purposes of insurance, to be a part of the ship.⁽¹⁾ If a boat be washed overboard, it is considered to be a species of loss that is insured against, unless the accident happen through the fault of the captain and crew. If a boat, lashed upon deck, is washed overboard, all insurers agree that this is one of the kinds of loss insured against. Mr. Stevens says it is the same if the boat is 'properly lashed to the quarters.'⁽²⁾ But whether a boat may be *properly lashed* in this situation, seems to depend upon the number of boats that it is necessary to carry, and upon the size and employment of the vessel. The employment of whaling ships makes it necessary to carry the boats on the outside of the ship, and no objection is made to paying for a boat, which is lost on a voyage of this description, on account of its being carried in this situation. Men of war and large merchant ships carry boats at the stern and on the quarters, but the former situation is said to be much the less exposed of the two. In regard to merchant vessels generally, however, if a boat fastened to the stern-davits, is damaged or lost, by whatever degree of violence of the waves, it is the more general opinion of writers and practical insurers, that the loss cannot be claimed under the policy,⁽³⁾ this being said not to be a proper and safe situation of the boat. Some insurers adhere to this rule strictly in practice. Others pay for a boat, thus fastened, from a disposition to put a liberal construction upon their contract, in favour of the assured; though they think the risk on a boat so carried is greater than if it were lashed on deck, and that it is the fault of the master to carry it in this manner.

Loss and damage of boats.

(1) Stevens, P. I. c. 3. a. 4.

(2) P. I. c. 3. a. 5.

(3) Stevens, ut supr.

But others make no objection to the payment of the loss in such a case, because they say that it is convenient in general to carry a boat at the stern, which may be readily let down to save a man who may be washed overboard, or to take up any thing that may be dropped overboard. The loss of a boat so carried, by vessels navigating the Mediterranean, was formerly paid for without objection, because the carrying the boat in this

(4) 1 Emer.
624. c. 12. s.
41.

Loss on sails,
rigging, ca-
bles and an-
chors, is not
easily distin-
guished from
wear and
tear.

situation often facilitated the escape of the crew in case of the capture of the vessel by corsairs.(4)

It is the most difficult to distinguish what is wear and tear, and decay, from the damage which constitutes a loss, in the case of sails, rigging, cables and anchors. If the sails are necessarily cut away in order to save the masts or yards, and for the general safety, or a cable is cut or slipped for the purpose of escaping from an impending peril, which is insured against, or a hauler is used to secure a temporary rudder, or to supply the place of a parted shroud, or sails and ropes are used for the purpose of stopping a leak, though the thing sacrificed is old and would soon have been worn out and destroyed by use, yet the voluntary sacrifice of it, gives a valid claim against the insurers, for compensation according to its value.

But where the damage or loss is not voluntary, it is difficult, in many instances, to determine whether it ought to fall upon the owner of the vessel or the underwriter. The parting of a rope or cable, or the splitting of a sail, is not in itself necessarily a proof of the extraordinary operation of the perils of the sea, for this will happen from use and decay in the most favourable weather, and under the most fortunate circumstances. Damage and loss of this sort therefore commonly belongs to the owner of the vessel to bear, and does not constitute the ground of any claim against the insurer, unless it takes place out of the common course of things, or appears to be the effect of the unusual and violent operation of a peril insured against.

Loss of cables
and anchors.

If a vessel at her port of destination or any port in the due course of the voyage, and without any gale or an unusually rough sea, being at anchor, on a *foul* or rocky bottom, has her cable chafed off; some say it is the owner's loss as a part of the wear and tear; others consider it a loss within the policy, as being an extraordinary specific damage, which could not have been avoided.

A vessel, that was insured against capture and perils of the sea, being captured on suspicion of having enemies goods on board, and carried into Plymouth, was anchored by the prize master in the outer harbour on a *foul* bottom, but where vessels frequently anchor. The cable was chafed off and the anchor thereby lost, though the weather had not been boisterous, or the sea remarkably rough. The vessel was released, and pursued her voyage. This loss was paid without objection by the insurers; though it possibly might not have been, if the vessel had gone to Plymouth in the regular course of the voyage,(1) but the being taken out of the course by one of the perils insured against, and the extraordinary circumstances of the case, were considered as rendering this damage, without any doubt, a loss within the policy.

(1) 2 Val. 81.
h. t. a. 29.

Where the cable of a vessel was cut off, during a violent gale, by being brought across the iron cable of another ship, the loss was paid without any question by the underwriters. It was a positive specific loss in consequence of an unusual and extraordinary degree of peril.

In distinguishing the wear and tear of the ship from the damage which constitutes a loss, the cases of a vessel's losing an anchor by being compelled by the perils insured against to come to anchor in an unusual place, or to carry a press of sail to escape an enemy, or to keep off from a lee-shore, have been very much discussed, and are said to have been the subjects of elaborate treatises in Germany. Magens mentions the case of a ship that was compelled to anchor in a rocky place by Heligoland, where several of her cables parted. This was considered at Hamburg to be a loss on the ship. He says, if such a loss does not come within the policy 'it ought to be compensated as a good piece of service,'⁽¹⁾ which implies a doubt whether this was a loss within the policy.

Case of a ship's being compelled to anchor in an unusual place, or to carry a press of sail to keep off from a lee-shore.

(1) v. 1. p. 53. s. 51.

The same writer says, 'We remember at London, where ships, endeavouring to keep clear of a lee-shore, had new sails blown away and cables parted by anchoring in an open sea, to avoid driving ashore, the losses were made good by the insurers, whose interest it always is to make it the master's interest to spare nothing, in such extraordinary cases, to save the ship from stranding.'⁽²⁾

(2) v. 1. p. 53. s. 51.

In the United States these two descriptions of loss are most generally, if not invariably, considered as coming within the stipulation of indemnity. It does not appear that these losses are, at present, distinctly considered in England, as coming within the policy.⁽³⁾

(3) Stevens, P. I. c. 3. s. 9. 2 N. R. 378.

No specific rule can be laid down in regard to ropes parted, and sails split or blown away. If it appear from the circumstances that the damage was caused by any extraordinary violence, the effects of which could not have been guarded against by taking in sail seasonably, and that the damage was not occasioned in any degree by the fault of the captain and crew, it is a loss within the policy.

It will be subsequently considered in what cases any of the preceding losses are general or particular average. To whichever of these descriptions a loss belongs, the principles by which it is determined to be within the policy, are the same; it must in either case happen under extraordinary circumstances, or result from the extraordinary operation of the perils insured against.

Section. 8. Piracy, Robbery, Theft.

The peril from pirates is one of those expressly enumerated in the general form of the policy. It seems, however, from old authorities, that this risk would be covered under *perils of the seas*, though it were not expressly insured against in the policy under the description of piracy. It has been determined that in the case of charterparties, by which it is stipulated to convey and deliver goods, the perils of the seas excepted, that it is a loss by the *perils of the seas* under this exception, where the vessel is robbed or taken by pirates.⁽⁴⁾

Piracy is a peril of the seas.

(4) 1 Roll Abr. 248. pl. 10; Comb. 56; Park, 103.

Loss by a
mob.

(1) *Nesbitt v. Lushington*,
4 T. R. 783.
(2) *Brown v. Smith*, 1 Dow,
349.

Loss by mu-
tiny.

Loss by rob-
bery.

Losses by
theft.

(3) *Harford v. Maynard*,
Park. 33.
See also 1
Emer. 534.
c. 12. s. 29;
Roc. n. 42;
1 Mag. 76. s.
63.
(4) tit. Theft.
(5) n. 55.
(6) c. 12. s.
29.

Under this clause Lord Kenyon thought the assured would have been entitled to indemnity for a loss on a cargo of corn, occasioned by a mob that came on board of a vessel lying at Elly harbour, in Ireland, and took the government of her from the captain and crew, and ran her upon a reef of rocks, whereby the cargo was damaged; had the insurers not been exempted from the loss under the memorandum against partial losses on that article. He said, 'If a partial loss could have been recovered upon this policy, the assured might have recovered for a loss by pirates.'⁽¹⁾

Under the risk of pirates and rovers, or under perils of the seas, the insurers are liable for losses by a mutiny of the crew.⁽²⁾

Besides the risks from pirates, the policy usually provides for indemnity against those of *rovers* and *thieves*, but in some policies the description of this peril is different, and the insurers agree to indemnify against loss by *assailing thieves*. By insurance against these risks, and that of piracy, the assured is protected against all robbery and plunder, committed with violence and superior force, whether by sea or land, while the goods are at risk within the conditions of the policy.

There is, however, a distinction between plunder committed with superior force, and simple larceny without violence. In most cases the insurers are not answerable for losses of this latter description, because such losses might be prevented by proper vigilance. It is probably for the purpose of adapting the policy to this distinction, that some underwriters have introduced the words *assailing thieves*, instead of *thieves and rovers*. But these latter words do not, in general, cover losses by theft, except those which are accompanied by violence, or where the theft is committed under circumstances in which it could not be prevented.⁽³⁾

Weskett⁽⁴⁾ thinks that the insurers are not answerable for 'thefts committed during the night by land robbers, who come on board while the vessel is in port.' He is speaking of a case of theft without violence.

Pothier⁽⁵⁾ says the insurers are liable for loss by plunder on shore, after the shipwreck of the vessel. The reason given by Emerigon⁽⁶⁾ is, that it would be a case of total loss, by which the property passes to the underwriters, and thus the loss by plunder would be directly their own; *res perit domino*. But this would not necessarily be the case, according to the construction of this contract in England and the United States, since the assured is not obliged to abandon and claim for a total loss; but has his election to claim either for a total or partial loss. A sufficient reason seems to be, that, by the operation of one of the perils insured against, the property is put into a situation in which it is not in the power of the captain and crew to defend it. The case is not distinguished in principle from one of piracy or robbery.

That the underwriters are liable for theft and plunder consequent upon shipwreck, has been decided in the case of a policy on goods from London to the Isle of France, in which some of

the goods were saved, after shipwreck, and got on shore at the Isle of France, where they fell into the hands of the natives, who destroyed a part and plundered the remainder.(1)

(1) *Bondrett v. Hentigg*, 1 Holt, 149.

Section 9. Capture and Detention.

In policies of the common form the property or interest is insured against 'takings at sea, arrests, restraints, and detentions, of all kings, princes and people, of what nation, condition, or quality soever.' This part of the policy protects the assured against loss by capture and detention. By capture is meant the taking possession of property with the purpose of appropriating it to the captor's own use, by which it is distinguished from a mere detention, with the design of ultimately liberating the property, as in the case of an embargo.(2) A seizure is equivalent to a capture, as it is made with the intention of depriving the owner of his property in the subject.(3)

The policy extends to captures, arrests, and detentions by public enemies; by belligerents, where the property insured is neutral;(4) or by the government of which the assured is a subject.(5) The insurers were liable for the loss of a vessel taken by government for a fire-ship,(6) or the capture of neutral property by those acting under a commission from the government of which the insurers are subjects, in case the risk of the capture can be legally insured against.(7)

This clause of the policy is more generally understood to apply to captures, seizures, and detention by the commissioned officers and agents of some lawful and acknowledged government. Accordingly Mr. Justice Buller said, the word *people* in this clause 'means the supreme power; the power of the country, whatever it may be.'(8) Thus the court considered the loss of a cargo of corn by a mob at Elly Harbour, as coming under the clause relating to piracy. But the words of the clause respecting capture and detention seem to be broad enough to comprehend perils of this description arising from pirates, or any persons who may capture or seize the property without any commission or authority for this purpose from any supreme power, which is established and recognised as such.

If war is declared after the policy is made, and the risk of capture thereby increased, the assured is still protected against this peril, since the risk of a declaration of war is one of those assumed by the insurers; who on the other hand are entitled to retain the whole premium for a war risk though peace is made, and the perils thereby diminished before the risk expires.

In regard to what constitutes a capture or seizure there is no room to doubt; the uncertainty, if any, being in relation to the facts proved, and not to those necessary to make a capture.

But it is otherwise in regard to arrests, restraints and detentions, for in many cases where there was no dispute respecting the facts, there was still a doubt whether those facts constituted a detention, arrest or restraint, within the policy. If the vessel

What constitutes a capture or seizure.

(2) 1 Emer. 535. c. 12. s. 20. Poth. h. t. No. 56.

note by Estrangin.

(3) 11 Johns. 287.

(4) *Rhine-lander v. Ins. Co. of Penn.*

4 Cranch, 29.

(5) *Nantes v. Thompson*, 2

East, 385.

(6) *Green v. Young*, 2

Salk. 444; 2 Ld. Raymond, 840.

(7) *Anthony v. Moline*, 5

Taunt. 711; *Schnakoneg v. Andrews*, 5

Taunt. 716; *Bazett v. Meyer*, 5

Taunt. 824.

(8) *Nesbitt v. Lushington*, 4

T. R. 783.

What constitutes an arrest within the meaning of the policy.

is detained by an embargo, whether imposed by the government of which the parties are subjects, or by a foreign government, it is an arrest and restraint within the meaning of the policy; (a) and so if the vessel be stopped for search, and sent in for examination. (1) In such cases there can be no doubt the vessel is arrested and detained, though the question may still arise whether any loss is occasioned, or whether it be a loss for which the insurers are answerable.

(1) 1 Mag. 67.

Whether the blockade of the port of destination, or a prohibition of entry is an arrest, restraint, or detention, within the policy.

But where intelligence is received on the voyage that the port of destination is blockaded, or the captain is warned that the voyage is interdicted, and he will be exposed to capture by proceeding on his course, the question has arisen and been elaborately discussed in many cases, whether this is an arrest or detention. Must the captain proceed for his port of destination, notwithstanding such warning, and take the hazard of capture? or must he turn off to some neighbouring port, or return to his port of departure, and wait until the blockade, or other obstacle to the voyage is removed? Or is the voyage broken up so as to make the insurers answerable for a total loss? That it is the duty of the captain in such case not to proceed and expose his vessel and cargo to certain or very probable capture, is obvious, since it appears from the general principle, already laid down, that the insurers are not liable for any losses occasioned by the misconduct of the assured or his agents, or against which the precautions suggested by a just and ordinary prudence, are not taken. Accordingly it has been held that if the captain disregard the danger of which he has sufficient notice, and proceeds on the voyage in such case, whatever loss happens, it will be through his fault, and the assured cannot recover for it, unless the captain's misconduct amounts to barratry. (2)

(2) Schmidt v. Unit. Ins. Co. 1 Johns. 260, 263; Richardson v. Maine Ins. Co. 6 Mass. Rep. 117. (3) Putnam v. Wood, 3 Mass. Rep. 486; Scott v. Libby, 2 Johns. 336. (4) The Saratoga, 2 Gal. 164.

Of the maxim that the insurers are not liable for losses occasioned by the fear of a peril.

The effect therefore is to prevent the vessel, at least, from pursuing her course. This is an inevitable accident which discharges the owners from their obligation, under the charter-party or bill of lading, to transport the cargo to the port of destination, (3) and dissolves the contract with the mariners for wages. (4)

The interruption of the voyage by blockade, interdiction at the port of destination, or the imminent peril of capture, has been said, in some cases, not to be a loss within the policy, because the insurers are not liable for a loss incurred through *fear of a peril*, or *quia timet*. It is not easy to say what is the precise import of this maxim respecting *fear of a peril*. The common form of the policy provides that, 'in case of any loss or misfortune it shall be lawful for the assured to sue, labour, and travel, in and about the defence, safeguard and recovery of the property, to the charges whereof the insurers will contribute.'

(a) Beawes, 268, tit. Embargo, &c.; Grot. de jure bel. l. 2. c. 2. s. 10; 1 Black. Com. 270; Blackenhagen v. Lond. Ass. Co. 1 Camp. 454; Rotch v. Edie, 6 T. R. 413; Olivera v. Un. Ins. Co. 3 Wheat. 183; Odlin v. Ins. Co. of Penn. Condry's Marsh. 508. n.; Wharton's Dig. p. 335. No. 170.

If this clause applies only to cases where a direct and visible damage has actually happened to the property, such as shipwreck or capture, still it must have reference to something future—the assured sues and labours to prevent the property from being plundered in one case or condemned in the other—he has reference to something which he *fears* may take place.

The insurers are liable for what is paid to captors by way of compromise; here the peril has actually overtaken the property; it has been captured; but in offering a compromise, the assured is determined by the prospect of the condemnation of the property, or of the expense of obtaining its release. What has actually happened, namely the capture, seems to be of no importance except as it makes detention, or the condemnation of the property, or expense of obtaining its release, probable; and a compromise to prevent an impending capture, which would otherwise be inevitable, seems to stand very much upon the same ground with a compromise to prevent the consequences of a capture already made. Whether the fear is, that the peril will *begin*, or having begun, will *continue* to operate on the property; the interest of the parties seem equally to require the assured to act upon such *fear*, where it is well grounded. Insurers were held liable for the loss of specie thrown overboard at the time the ship was captured, to prevent its falling into the hands of the enemy.⁽¹⁾ Yet it was thrown over for *fear* it would come into his hands; and though this was done at the time of the capture, this only proves that the peril was so impending, as to justify the assured in acting with reference to it. The insurers are held liable for the loss of a vessel voluntarily burnt to prevent her falling into the hands of the enemy.⁽²⁾ This was held by Lord Ellenborough to be a loss by *fire*, but this only relates to the manner of declaring in the action, for the insurers certainly could not be liable unless enemies and capture were among the risks insured against.

Jettisons and many other losses that are subjects of general contribution, are often incurred on account of an impending peril that has not at the time begun sensibly to take effect upon the property, as well as on account of what is apprehended from the continuance of a peril that has already begun to operate; yet if the peril be insured against, the insurers are liable for these losses.

There appears to be reason, therefore, to infer, that the insurers are liable for a loss that may fairly be considered to be exclusively and solely occasioned by a peril insured against, whether the loss prevents, or is concurrent with, or follows, the actual happening of the peril. It accordingly seems to be difficult to attach any precise meaning to the maxim, that insurers are not liable for loss by *fear of a peril*. If the assured incur losses, and make extraordinary sacrifices, when the peril is so remote and improbable that an ordinary and reasonable prudence does not require or justify his steps, the loss might be considered as occasioned by his *fears*, that is, through his fault, and not by the perils insured against. And so if the assured

(1) Butler v. Wildman, 3 B. & A. 398.
(2) Gordon v. Rimmington, 1 Camp. 123; Poth. h. t. n. 53. and Estrangin's note; Valin, h. t. a. 26.

do no more in avoiding a peril than is considered his customary and ordinary duty in navigating the ship, the insurers are not liable, for there is in fact no loss. But the maxim of *fear of peril*, seems not to have either of these constructions, as will appear from the manner and connection in which it is introduced and applied in some of the subsequent cases on the subject of arrests and restraints.

The question, whether interdiction of trade at the port of destination, interception of the voyage by blockade, or imminent danger of capture or seizure, amount to an arrest, restraint, and detention, for which the insurers are liable, has occurred in different cases in England, and has been very elaborately considered in the courts of the United States. In most of these cases the maxim *quia timet* has been introduced.

Entry at the port of destination prohibited.

An insurance, against total loss only, was made upon a cargo of pilchards, from Cornwall to Naples, on board of the English ship *Pascaro*. Intelligence was received on the voyage that English vessels were excluded from all ports belonging to the king of Naples, and the captain, by order of the commander of the convoy, in company with which he sailed, made port Mahon, in Minorca, where, after obtaining a survey of his cargo, under an order of the admiralty, he caused it to be sold; it being of a perishable nature. The underwriters being liable only for a total loss; if the necessity of selling the cargo, and breaking up the voyage, was owing to the perishable nature of the article, the insurers were not liable. This objection is blended in the opinion given by the court, which seems however to turn on the consideration that the peril is not covered. *Alvanly, C. J.* giving the opinion of the court, said, 'That where the underwriters have insured against capture and restraint of princes, and the captain, learning that if he enter the port of his destination the vessel will be lost by confiscation, avoids that port, whereby the object of the voyage is defeated, such circumstances do not amount to a peril operating to the *total destruction* of the thing insured.' To give the assured a right to recover, 'the loss must be occasioned by a peril insured against acting upon the subject insured immediately, and not circuitously, as in the present case. Without entering into the question, how far what has happened can be considered a total destruction of the thing insured, I think that the detention of the cargo on board of the ship at a neutral port, in consequence of the danger of entering the port of destination, cannot create a total loss within the meaning of the policy, *because it did not arise from a peril insured against.*' (1) That is to say, it is not an arrest, restraint, or detention, within the meaning of the policy.

(1) *Hadkinson v. Robinson*, 3 B. & F. 388.

The port of destination in possession of the enemy.

(2) *Lubbock v. Rowcroft*, 5 Esp. 50.

In a case of the voyage being given up on account of the port of destination having fallen into the hands of the enemy, after the sailing of the vessel, *Lord Ellenborough* said, 'The abandonment was from an apprehension of an enemy's capture, and not from any loss within the terms of the policy.' (2)

In an action upon a policy on goods 'from Bristol to Monte Video and any other port or ports in the river Plata, in possee-

sion of the English,' it appeared that when the vessel arrived in the river Plata, Monte Video, and every other port in that river, except Maldonado, were in possession of the Spaniards, who were at that time public enemies; and on the vessel's coming to Maldonado, the English commander there ordered her away, on account of the urgency of public affairs which did not admit of any delay; whereupon the vessel bore away for Rio Janeiro, being the nearest friendly port of safety, and a loss occurred before her arrival there. Lord Ellenborough and the other judges were of opinion 'that the policy could not be extended to cover the voyage to Rio Janeiro, notwithstanding the circumstances which had occurred to induce the necessity of it;' and were so decided in this opinion that they would not permit the question to be brought up for argument.⁽¹⁾

(1) *Parkin v. Tunno*, 11 East, 22. S. C. 2 Camp. 59.

Another case involving this question came before the same court. It was that of a policy on goods on board of the Wolga, a British vessel, from Hull to St. Petersburg, 'to return two per cent of the premium for convoy in the Baltic, and arrival.' By orders from the public ships, the vessel waited some time at Helsingberg Roads, for convoy. After proceeding thence with convoy, the commander of the convoy informed the captain of the Wolga, that an embargo was laid on all British ships in the Russian ports, and ordered him not to proceed, but to wait for orders from the commander in chief, in Copenhagen Roads, as to his future destination. The captain of the Wolga was then ordered to proceed to Helsingberg Roads, and afterwards he thought it best, under all the circumstances, to return to England. The counsel for the assured, put the claim for a loss on the detention by the public ships, but for which, it was said, the vessel might have arrived in Russia before the embargo was laid. The other ground of the exclusion from the port of destination was not insisted upon, for the reason probably that the point was supposed to be settled by the above cases. Lord Ellenborough said, 'This is no more than a detention by the convoy for a certain period, till by the laying of a hostile embargo in the destined port, the further prosecution of the adventure became impracticable, and the voyage was lost, which according to *Hadkinson v. Robinson*, is not a loss within the policy.'⁽²⁾

An embargo at the port of destination prevents the ship from proceeding.

(2) *Forster v. Christie*, 11 East, 205.

In case of insurance upon goods, from London to Revel, the vessel sailed on the voyage, but the master, on receiving intelligence that an embargo was laid on British vessels in Russia, put back, and the vessel was lost while on the course in returning to England. Lord Ellenborough said, 'This case will hardly bear to be stated. The underwriters were bound to indemnify the assured for any loss that should happen on the voyage to Revel. If, being unable to get to Revel, the ship had lingered in that quarter, or had necessarily returned with the intention of ultimately completing the original voyage, a question of some nicety might have arisen. But by sailing back to England in the manner she did, the original voyage was abandoned, and the underwriters were discharged. Had the ship been coming home as the best means of getting finally to Revel, and there

(1) *Blackenhagen v. Lond. Ass. Co.* 1 Camp. 454. had been a possibility of her being able to accomplish that object, when the loss happened, she might still have been considered in the course of the voyage insured. (1)

The assured being nonsuited in the preceding action, brought another in the Common Pleas, where Sir J. Mansfield was of the same opinion with Lord Ellenborough, but the jury, contrary to the opinion of the judge, found a verdict for the assured, which the court set aside. (2)

(2) *Ib.* 456. n. Decisions in Massachusetts in respect to a blockade of the port of destination.

The same question came before the court in Massachusetts in 1809, upon a policy for a voyage from Salem to Malaga, on the cargo of the barque *Active*, which was boarded, during the voyage, on the third of January, 1808, by a British privateer, and warned not to proceed to Malaga, nor any other port whatever excepting in Great Britain, Gibraltar, or Malta; and the master of the barque was advised to return to Salem, as the best thing he could do. The warning was endorsed on the register and sea-letter of the *Active*, and a copy of the British orders in council, in pursuance of which the warning had been given, was left with the master, who had no knowledge of those orders before that time. The master, after consulting with the crew, discontinued his voyage, and proceeded back on his course for Salem, and while so proceeding was captured as prize by another British privateer, and ordered for Nevis, but before arriving there rescued his vessel from the prize crew, and again steered for Salem, at which port he finally arrived. Chief Justice Parsons gave the opinion of the court. He said, 'It is made a question whether a well grounded fear that a total loss will arise from one of the perils insured against, if the voyage be pursued, is itself a peril within the policy; and on the best consideration we can give this question, we are satisfied that this *fear of a loss* thus stated, is not a peril within the policy. To admit it to be a peril insured against would be productive of much uncertainty and open a door to frauds on the insurer.' (3)

(3) *Richardson v. Maine Ins. Co.* 6 Mass. Rep. 102. See Mr. Justice Brackenridge's remarks upon this case, 5 Bin. 421.

In case of an insurance upon a vessel and cargo for a voyage from Salem to St. Andero in Spain, the vessel, while pursuing the voyage, was boarded by a British armed ship, the commanding officer of which endorsed upon her register a notice similar to that mentioned in the preceding case. The vessel proceeded to Gibraltar. Chief Justice Parsons, giving the opinion of the court, said, 'Had the master after the warning by the British ship proceeded on his voyage to St. Andero, his vessel and cargo would probably have been captured and condemned, on the ground of the cargo being contraband. We are satisfied that the voyage was lost through a just and reasonable fear of capture for having a contraband cargo on board; that the underwriters did not insure against a capture for this cause;—and that if they had so insured, a fear of capture, however reasonable, is not a peril insured against.' (4) The court, said in this and the preceding case, that the cargo became contraband, by the master's proceeding towards a blockaded port after notice. (5)

(4) *Cook v. Essex F. & M. Ins. Co.* 6 Mass. Rep. 122.

(5) See also *Wheatland v. Gray*, 6 Mass. Rep. 124.

In case of insurance of a cargo of fish for a voyage from Boston to Leghorn, in the course of the voyage the master of

the vessel received intelligence at Gibraltar, of the British orders in council above-mentioned, which rendered his ship and cargo liable to capture if he proceeded towards Leghorn; and of the Milan decree of the French emperor, by which his vessel and cargo would have been subject to seizure and confiscation at Leghorn, on account of his having stopped at an English port. The captain, after some delay at Gibraltar in expectation that the orders and decrees might be recalled, concluded to abandon the voyage. Accordingly before leaving Gibraltar he sold his cargo, which was in a heating state, and would soon have perished if it had been kept on board. Chief Justice Parsons, giving the opinion of the court, said, 'The master abandoned the voyage from a well-grounded fear of capture. It is our opinion that this is not a loss by any peril for which the insurers are answerable.'⁽¹⁾

A similar opinion has been given by the same court in subsequent cases.⁽²⁾

The same court has extended the principle of the preceding cases to that of a vessel prevented from leaving port by the danger of capture. In case of insurance upon the ship *Laura* at and from a port or ports in the River Plate to Boston, the ship was at Buenos Ayres in 1812, when intelligence was received there of the breaking out of the war between Great Britain and the United States. At the same time a British frigate and gun brig were lying in the river below Buenos Ayres, the officers of which had made known to the master of the *Laura* that they should capture his vessel if he attempted to go to sea, in attempting which he must have passed very near them, and would have been exposed to certain capture. The *Laura* accordingly remained at Buenos Ayres, and the assured abandoned, and claimed for a total loss by restraint. The court said, 'There was no application of hostile force, to prevent the sailing of the ship, and although her sailing would have been attended with imminent risk, yet if that risk would authorize an abandonment, the fear of capture would become a peril insured against, contrary to the decision of *Richardson v. The Maine F. & M. Ins. Co.* This is certainly a strong case, but we cannot make new and nice distinctions.'⁽³⁾

This subject was elaborately investigated in New York, in an action on a policy on goods 'from New York to Hamburg on board the *Orozimbo*.' On the voyage insured the ship was boarded in the English Channel by a British ship of war, and the master was informed that the Elbe was blockaded, and by an endorsement on his ship's papers he was forbidden to proceed thither. Off the Isle of Wight he was again boarded by another British ship of war, which confirmed the intelligence of the blockade, and he was again warned not to proceed to the Elbe, under penalty of being made prize. Under these circumstances he went into Spithead to obtain advice of the agent of the ship-owner, by whom he was advised 'to go to Embden, as the nearest neutral port to Hamburg,' to which port he pro-

(1) *Amory v. Jones*, 6 Mass. Rep. 318.

(2) *Lee v. Gray*, 7 Mass. Rep. 349; *Tucker v. Unit. M. & F. Ins. Co.* 12 Mass. Rep. 288.

Case of a ship prevented from leaving port by the danger of capture.

(3) *Brewer v. Un. Ins. Co.* 12 Mass. Rep. 170.

Decisions in New York on the same point, namely, whether an exclusion from the port of destination by blockade, &c is an arrest and restraint.

ceeded, where the consignees at Hamburg finally consented to receive the cargo, though they would have preferred that it should have been delivered at Lubeck. Upon these facts an abandonment being made, two judges were of opinion that the assured had no claim, three, that he was entitled to recover.

(1) *Pole v. Fitzgerald*,
Willes, 644.

Mr. Justice Spencer said, 'The assured claim under *arrests, restraints, and detainments*. The terms do not I think embrace a case like the present; for the master of the Orozimbo never attempted to enter the port of Hamburg, nor was there any actual or immediate restraint, to hinder him from doing so. There has been no force or *vis major* to interrupt the voyage. The insurance is not on the voyage but on the subject for the voyage.(1) Here the ship and cargo remain, in safety, but the assured has lost the chance of going to so good a market. The insurer has nothing to do with the state of the market. The plaintiff's counsel have said an embargo is within the policy, and have asked why is not a blockade? The answer is obvious; an embargo operates directly on the subject insured, and this does not.' Tompkins, J. was of the same opinion.

Mr. Justice Thompson said, 'The underwriter stipulates that the goods shall not be prevented from arriving at their place of destination, by any of the perils insured against. In the present case I think there was a total failure and loss of the voyage by a peril coming within the meaning of the policy, under the terms *restraint of princes*.'

(2) cap. 59.
291.

(3) *Disc. 23*.
n. 84.

(4) v. 1. p.
507. c. 12.
s. 26.

Mr. Justice Livingston said, 'It is sufficient to justify the master's conduct, in cases of this kind, if he have good reason to apprehend that a capture will be the consequence of his going on. A just fear says Targa(2) is a kind of violence, so that abandonment of a vessel from a *doubt* of not being able to resist, and especially of being made a slave, is a loss within the policy. And Casaregis(3) after observing that in such case "a captain should not rashly forsake his ship," adds, "that it is otherwise if the circumstances are such as may excuse fear, credulity, or even an error of the captain." Emerigon(4) also mentions several instances in which fear of a shipwreck, an enemy, pirates, or the like, which appeared just at the time, though not in fact well founded, have justified a dereliction of the property. These principles apply to the Orozimbo, if we once admit that capture is a peril insured against. If the master were really afraid of condemnation if he attempted to enter the Elbe, he was not bound to proceed. If he had proceeded, and a loss had ensued, he would have been censured, and have furnished a better ground of defence than is now taken.'

(5) tom. 1. p.
542. c. 12. s.
31.

Chief Justice Kent, after saying that the case of *Hadkinson v. Robinson* was not applicable, and that the interdiction of commerce at the port of destination, after the risk commences, is stated by Emerigon(5) to be one of the perils insured against; proceeds; 'nor do I see why a blockade should not be deemed equivalent to any other restraint or detention. It answers the description of a peril as understood in a policy, and which in-

cludes every peril arising from a *vis major*, which could not be resisted, or from a *cas fortuit*, which human prudence could not foresee. It equally interrupts and destroys the voyage. Liberty to go to another port is changing the mercantile adventure, and is nothing less than the compulsory institution of a new voyage.⁽¹⁾

(1) Schmidt v. Unit. Ins. Co. 1 Johns. 249.

Three other cases came before the same court in 1810, on this subject; in one of which the policy was on the ship, from New York to Barcelona or Salon, 'warranted American property, proof whereof to be made here only—In case of capture or detention not to abandon in less than six months after advice thereof; or until after condemnation—If turned away for attempting to enter a blockaded port, the assured to be at liberty to proceed to a port not blockaded, but not to be liable for loss, for seizure, or detention, at the port of destination, in consequence of having touched by choice or force, at a British port.' The other two policies were on the cargo, with a warranty 'not to abandon, if captured, until condemnation, or until after a detention of six months after advice of the capture.' The vessel having been out twenty-five days from New York, met a British cruiser, the officers of which endorsed on her papers a warning 'not to enter any port in France, Holland, Denmark, Spain, Portugal, Italy, or any other ports from which the British flag was excluded,' and furnished the master with a copy of the British orders in council by virtue of which this warning was given. The master was also informed that the Algerines had made war against the United States and taken a number of American vessels, and that the American consul at Gibraltar had sent out word to all American vessels bound up the Mediterranean, to call at Gibraltar for advice; where the master accordingly put in, and was detained for some time. After being permitted to depart, and when he was about to proceed to Barcelona, he received intelligence of the French and Spanish decrees, subjecting the vessel to capture and condemnation on account of having put into a British port, and learned at the same time that Barcelona was occupied by the French. It seemed however that he was not apprehensive of seizure and confiscation in the port of Barcelona; but in consequence of intelligence that the French and Spaniards were constantly capturing American vessels, between Gibraltar and Barcelona, and on account of the danger from this cause, he gave up the voyage and returned with the vessel and cargo to New York, where both vessel and cargo were abandoned to the insurers, and a total loss was claimed.

Danger of capture by a belligerent.

Chief Justice Kent gave the opinion of the court. He said, 'The peril, if any, arising from the decrees, consisted either in the danger of capture in the passage to Barcelona, or a seizure and confiscation after arrival there.

'I have no idea that the apprehension of capture *in transitu*, between Gibraltar and Barcelona, afforded a justifiable ground of abandonment. The proposition is wholly destitute of authority. It would lead to inconvenient and extravagant consequences, and confound all distinction between imaginary and

(1) tom. 1. p.
507. c. 12. s.
26.

apprehended danger, and danger present and palpable. In the cases cited by Emerigon(1) in which a just fear of one of the perils insured against, was held equivalent to *force majeure*, and sufficient to charge the loss upon the insurer, the danger was imminent, apparently remediless and morally certain. Targa says, a just fear is a species of violence, and justifies an abandonment of the ship, and Emerigon admits the same thing. But the cases given, by way of illustration, explain what is meant by a just fear. It is the fear of being made a slave, or a prisoner, or of perishing in a case of extremity, or when defence becomes impossible.'

'In the present case the danger of capture was only contingent. There was no reasonable certainty of capture. A belligerent vessel might always be abandoned on that ground, without venturing on the ocean; for to such vessels there is always more or less danger of capture, as there is of shipwreck. It is this very risk which the assured must encounter and against which the insured is to indemnify.'

'The only danger, if any, that could support the abandonment, was that of seizure at Barcelona, under the Aranjuez decree, and I think it would be going too far and beyond any precedent, to adjudge that cause to be sufficient. If the port of Barcelona had been absolutely interdicted, so that the prosecution of the voyage to a conclusion had become impracticable, or been attended with a moral certainty of seizure and loss, I should have deemed it equivalent to actual restraint, to the existence of a *vis major* breaking up the voyage, and that the assured had ground for their claim. When such restraint actually exists, and is ascertained to be effectual, and no doubt arises of its being exerted, it would be most unreasonable to require the assured to go on, and submit to the experiment of capture, or the imminent hazard of the attempt. It would be fatal to the interest of all concerned. It would be against the *duty* of the assured, and he would be under a moral inability to do it.'

'I admit the good sense of the rule, that the assured shall not abandon *quia timet*, in cases in which the danger is remote and contingent, as where storms, cruisers of an enemy, or pirates threaten a vessel *in transitu*. But I do not perceive the fitness of its application to cases in which the port of destination is discovered and duly ascertained, in the course of the voyage, to be shut, by being in possession of an enemy, or by interdiction of trade, or by a blockade. The restraint is as much felt, and operates as effectually, as if the vessel was actually seized. The act of entry, and the attempt to do it, become unlawful. It is as unlawful to rush into the arms of an enemy with your property, as it is to break a blockade, or force an entry into a port, when an entry is prohibited by the sovereign of such port.'

'There may be doubts from what point the voyage is to be abandoned, and what species of demonstration of the danger the assured ought to require. But assuming the fact of the existence of such an impediment, and of the reasonable certainty, that it would be made effectual, to the loss of the subject

insured, the assured is justified in giving up the voyage, and calling on the insurer to indemnify. It amounts to a loss of the voyage. No deviation can help the party, for the peril existed at the port of discharge; and if the restraint is not limited, or transient, the *spes recuperandi*, as to the voyage, is as much gone, as if the vessel was detained, in the course of her voyage, by an embargo or capture.'

'In the present case, however, I do not think that the port of Barcelona was shut, so as to bring the case within the reach of the principle. It was not shut generally or absolutely against American vessels. The Spanish decree which operated at Barcelona, applied only to neutral vessels, under certain special circumstances; and whether this vessel came within the operation of that decree, was a matter of uncertainty; depending on the judicial construction which the decree might receive, in its application to that case.'

'To make out a just ground of abandonment from this decree, it ought to have been *certain* that the decree applied to the case of this very ship; and it ought to have been equally certain that it would have been put in force against the ship, had she arrived at Barcelona, and before she could have anchored twenty-four hours in good safety. If there existed a reasonable *doubt* of danger in both or either of these respects, the case did not amount to that just fear, which the authorities cited by Emerigon, consider as equivalent to the application of physical force and violence. I cannot consider the danger of arrest and restraint at Barcelona, from this decree, to have been so certain and manifest, as to be in any degree a substitute for the arrest itself. The captain did not consider the danger of arrest at Barcelona under the decree as worth regarding; for he declares, that he broke up the voyage, from the danger of intermediate capture, and was persuaded that if the vessel had arrived at Barcelona, the vessel and cargo might have been protected and saved, notwithstanding the decrees.'^(a)

Insurance was made upon a cargo from New York to Sweden or Russia, with liberty to the vessel, 'to call at Gothenburg for orders.' The vessel arrived at Wingo Sound, near Gothenburg, on the 14th of July, 1812, where she remained at anchor until the 24th of that month, when the master received intelligence of the war between Great Britain and the United States, whereupon he proceeded to the town of Gothenburg to avoid capture. The Baltic was thronged with British cruisers, several of which were stationed in Wingo Sound, one or more of them being constantly in sight of Gothenburg, and the vessel could not go to sea without passing them. It was accordingly impossible to pursue her voyage without exposing the vessel to certain capture. The voyage was therefore broken up. This was held

Danger of
capture by the
public enemy.

(a) *Craig v. United Ins. Co.* 6 Johns. 226. A similar opinion was given by the same court, in another case, on a state of facts not unlike those of the above. *Corp v. Unit. Ins. Co.* 8 Johns. 277.

(1) *Saltus v. Un. Ins. Co.*
15 Johns. 523.

Decision on
the same ques-
tion in Penn-
sylvania.

to be an arrest and restraint within the terms of the policy, which rendered the underwriters liable for a total loss.(1)

The same question has occurred in Pennsylvania, in a case of insurance upon goods on board of the ship *Union*, from Philadelphia to Antwerp. The ship arrived in the Flushing Roads, on the 20th October, 1807, when a guard was put on board on account of her having been carried into England, and the guard remained on board until she sailed for Rotterdam, by the recommendation of the consignee at Antwerp; the ship being ordered to quit the Flushing Roads and prohibited from proceeding to Antwerp. While on the voyage towards Rotterdam, the ship was again captured by a British brig of war and sent to the Downs, but was permitted to proceed to Rotterdam on the master's agreeing, for the purpose of preventing further delay, to pay the captors' expenses; but before her departure the master heard of the decree in Holland, forbidding the entry of all vessels that had been in England. And the voyage was accordingly broken up, and a loss claimed on this account.

Chief Justice Tilghman, giving the opinion of the court, said, 'The defendants contend that they are not responsible because the voyage was not broken up by any peril insured against, but solely by decrees of the French emperor, which prohibited an entry into the port of Antwerp.'

In respect to the English decisions, and those given in Massachusetts on this question, he says, 'The assured may be placed in a very hard situation, as the law has been held. If he attempts to enter a blockaded port after notice, he forfeits the rights of a neutral; if he attempts to trade in a port into which an entry has been prohibited, even after the commencement of the voyage, his property is liable to confiscation; and if, being refused an entry, he steers for a different port, the underwriters are discharged, because it is not the same voyage that was insured.' But the court being of opinion that the abandonment to the insurers, had, in this case, been made too late, decided that the assured could not recover for a total loss.(1)

(1) *Savage v. Pleasant*, 5
Bin. 403.

Chief Justice Tilghman intimates that this case is distinguishable from those which have been decided in favour of the insurers in England and Massachusetts, but this distinction is not apparent. The reasoning of the Chief Justice is certainly applicable to those cases. But whether it be distinguishable from those or not, he intimates his opinion respecting those cases pretty distinctly by his remark that they put the assured in a 'hard situation.'

Decisions on
this question
in the Su-
preme Court
of the United
States.

This question has also come before the Supreme Court of the United States.(a) In one case before that court the policy was

(a) The case of *Symonds v. Un. Ins. Co.* 4 Dal. 417; *Condy's Marsh.* 564. n. decided in the circuit court of the United States, in Pennsylvania, favours the opinion, that where the vessel is turned away on account of the blockade of the port of destination, the insurers are liable.

on the freight of the *Venus*, from Philadelphia to the Isle of France; and while proceeding on the voyage in January, 1808, she was met and detained two days by an English ship of war, the officers of which endorsed her papers as follows, 'ship *Venus* warned from proceeding to any port in possession of his majesty's enemies;' and the master of the *Venus* was informed verbally that the Isle of France was blockaded, and that the *Venus* would be good prize if she proceeded thither. The master accordingly returned to Philadelphia, where the vessel was prevented from prosecuting the voyage by the American embargo. It appeared however that the Isle of France was not in fact blockaded. Upon these facts the court considered 'whether the apprehension excited by the warning, or by the verbal communication of a British officer, justified the return of the *Venus* to Philadelphia. She was not physically incapacitated from prosecuting her voyage; there was no legal impediment to her proceeding, because the voyage was not prohibited by the British orders; there did not then exist either in fact or in law, the restraint or detention against which the underwriters insured. From *fear*, founded on misrepresentation, the voyage was broken up. Whether this might be justified under any circumstances, it is unnecessary to determine. But the court is of opinion that the circumstances in this case did not justify it. The *Venus* ought to have proceeded, until she could obtain further information. It would be dangerous indeed if any false intelligence, received on the voyage, might justify the captain in acting as if that intelligence were true.'⁽¹⁾

After these decisions the Supreme Court of the United States in 1818, considered the question not to be settled, whether it was a loss by 'arrest and restraint,' where, after the sailing of a vessel from Baltimore, and before her leaving Chesapeake Bay, that port and all the others in Chesapeake Bay were blockaded by the British squadron, whereby she was prevented from proceeding on the voyage. The case was on a policy upon a Spanish cargo from Baltimore to Havana, and the vessel having sailed on the voyage, and being near the mouth of the Chesapeake, about the 8th of February, 1813, discovered four frigates, which proved to be a British blockading squadron. The vessel was boarded from the blockading squadron, and the following endorsement made on her papers by the boarding officer, namely, 'I hereby certify that the Bay of Chesapeake, and ports therein, are under a strict and rigorous blockade, and you must return to Baltimore, and on no account whatever attempt quitting or going out of said port.' The blockade had not commenced at the time the vessel sailed. An abandonment of the property was made, and a total loss claimed for this restraint.

Chief Justice Marshall, giving the opinion of the court, said, 'Believing this question not to have been expressly decided, the court has inquired how far it ought to be influenced by its analogy to principles which have been settled.'

(1) *King v. Del. Ins. Co.*
6 Cranch, 71.

The ship is prevented by a blockade from proceeding on the voyage.

‘Without contesting the reasonableness of the opinion, that the loss of the voyage occasioned by the detention of the ship, by her master, in a neutral port, is not within the policy; it may well be denied to follow as a corollary from it, that a vessel confined in port by a blockading squadron, and actually prevented by that squadron from coming out, does not sustain the loss of her voyage from the restraint of a foreign power, which is a peril insured against.’

‘An embargo is admitted to be a peril within the policy. But the sovereign imposing the embargo is virtually in possession of the vessel, and may therefore be said to arrest and detain her, yet, in fact, the vessel remains in the actual possession of the master or owner, and has the physical power to sail out and proceed on her voyage.’

‘The application of force is not more direct on a vessel stopped in port by an embargo, than on a vessel stopped in port by a blockading squadron. The danger of attempting to violate a blockade is as great as the danger of attempting to violate an embargo. The voyage is as completely broken up in one case as in the other, and in both, the loss is produced by the act of the sovereign power. There is as much reason for insuring against one peril as against the other, and if the word *restraint* does not necessarily imply the possession of the thing by the restraining power, it must be so construed as to comprehend the forcible confinement of a vessel in port, and the forcible prevention of her proceeding on her voyage; if so, the blockade is in such case a peril within the policy.’⁽¹⁾

(1) *Olivera v. Union Ins. Co.*
3 Wheat. 183.

But the court did not consider this decision as impairing the authority of *Hadkinson v. Robinson*, and *Lubbock v. Rowcroft*, above cited, which, they afterwards say, ‘have never been shaken.’⁽²⁾

(2) 6 Wheat.
106.

The voyage is broken up from danger of seizure that is not insured against.

The same court held in a subsequent case, that where the voyage is abandoned from fear of a seizure, from which the underwriters are expressly exempted, it is not a loss within the policy. It was a case of insurance upon the cargo of the *Ellen Tooker*, ‘from New York to port or ports in the Gulph of Mexico and back to the United States, free from loss by seizure or detention on account of illicit or prohibited trade.’ The master intended to have disposed of his cargo at Vantla or Talacuta, which he supposed to be in the possession of the Independents, both of which, however, he found in the hands of the Royalists. He was accordingly excluded from those ports, his voyage being in violation of the royal ordinances; and he was liable to seizure also by the Royalists, because his voyage was intended to supply the Independents with munitions of war. After putting to sea again from Talacuta he fell in with the fleet of General Mina bound to St. Ander, whither he proceeded with the fleet, and contracted with General Mina for the sale of his cargo, which was to be delivered there from time to time, as it might be wanted. But before the whole was delivered, a frigate of the Royalists hove in sight, to escape from which, the master of the *Ellen Tooker* put of sea, but returned again soon after to

St. Ander, which he left a second time to go to other ports for repairs and supplies, and on returning a third time to St. Ander, found it, together with all other ports of the coast at which the policy gave him liberty to discharge, in possession of the Royalists. He accordingly gave up the voyage and returned to the United States. The assured claimed a total loss by restraint and detention by 'Spanish authorities.' Mr. Justice Story, giving the opinion of the court, said, 'It is not sufficient that the voyage has been lost; the loss must be occasioned by some peril actually insured against. The peril must act directly and not circuitously upon the subject. It must be an immediate peril and the loss a proper consequence of it. The real cause of the destruction of the voyage was that St. Ander was occupied by the Royalists. A trade was inhibited with that place by the ordinary colonial laws of Spain, and the voyage in which the Ellen Tooker was engaged, placed her and her cargo in the character of an enemy. A proceeding to St. Ander would have subjected her to confiscation for a double cause, the breach of the laws of trade, and violation of neutral duties. The voyage then was broken up from fear of loss by reason of the seizure and confiscation of the property. It was abandoned by the master *quia timebat*, and not because there was any actual direct restraint.'⁽¹⁾

(1) *Smith v. Unit. Ins. Co.*
6 Wheat. 176.

As far as any of the preceding cases rest upon the ground that the underwriters are not liable for losses incurred by a *fear of a peril*, they seem, as has before been intimated, to depend upon a very obscure and uncertain maxim. If this maxim mean, that the insurers are not answerable for losses incurred on account of a peril too remote to be reasonably provided against, or the providing against which, is only the ordinary expense of navigating the ship, which is to be borne by the owners, it is only another and rather obscure mode of expressing two principles of which there is no doubt, and which are in themselves well understood, however difficult it may be to apply them in particular cases. If either or both of these principles be implied by *quia timet*, it seems to be much more intelligible to express them in the usual form. It does not appear what other meaning can be given to this maxim, though it does not, as has been already intimated, seem to have been always applied strictly in this sense.

Observations
upon the pre-
ceding cases.

We will accordingly consider the preceding cases as depending upon the questions, whether the risk in each particular case was within the policy; whether the peril was so remote at the time of taking measures relating to it, that the breaking up of the voyage cannot be said to be directly occasioned by the peril; and whether the measures taken were only those ordinary expenses, delays, and inconveniences, for which the insurers are not answerable, but which, like the wear and tear and decay of the ship, must be at the charge of the owner.

In regard to the case of the voyage to the Gulf of Mexico, the peril, on account of which the voyage was broken up, was plain-

ly not within the policy, since the insurers were expressly exonerated from loss by seizure for illicit or prohibited trade. If the vessel had proceeded to the port of destination, and the master had entered it, without knowing that it was in possession of the Royalists, and the vessel and cargo had been seized and confiscated, on the ground that trade was prohibited and unlawful, the insurers would not have been liable for the loss, though it would not in such case have been occasioned in any degree by the fault of the master. The interdiction of trade being at the risk of the assured, the insurers could certainly have no concern with the breaking up of the voyage on account of such interdiction.

In the other cases relating to the interdiction of trade at the port of destination, no mention is made of any provision in the policy on this subject. It is to be presumed, therefore, in relation to those cases, that if the master had proceeded to the port of destination, without any notice of the interdiction of the trade; and without any fault or negligence on his part, or that of the assured, the vessel and cargo had been seized and confiscated on account of the trade being prohibited, the insurers would have been liable for the loss. To determine whether a peril is insured against, it must be supposed to occasion a loss without any fault of the assured, or of the master of the vessel, since by whatever peril a loss is occasioned through the fault of the owner or his agents, the insurers are not liable except under the risk of barratry.

If in the course of the voyage the master is informed of the interdiction of trade, and turns off his course to put into port for advice, or for the purpose of a temporary delay until the obstacle to the voyage is removed; all the cases agree that the risk continues as long as he has the same port of destination in view. But it is supposed that the captain uses his discretion in choosing measures in such cases. He undoubtedly would not be justified in waiting for the interdiction to be taken off, or for the port of destination to be retaken by friends, where it had fallen into the hands of enemies, if he had no expectation of these events. It is as much the duty of the captain, in such a case, to proceed to some other port of discharge, or to return to his port of departure, as it is in ordinary cases to proceed to the port of destination with all convenient despatch.

If the vessel delays, with the expectation that the obstacle to the voyage will be removed, it is generally held to be one of those ordinary inconveniencies of which the loss and expense fall upon the owner, like those of delay by head winds and the like. This loss and expense will be more particularly considered subsequently, and the decisions relating to it cited.

But if there is no expectation of a removal of the obstacle, and the master is obliged by his duty, either to seek another port of destination, or to return to his port of departure, nobody will deny that this is an extraordinary proceeding; and that it is occasioned directly by the interdiction of trade at the port of destination, or by its being blockaded, seems to be very plain,

since there is no other cause to which it can be possibly attributed. It seems impossible to conceive a more complete and total dissolution of the voyage and breaking up of the adventure. To hold therefore that in such case the assured cannot abandon for a total loss, and that the vessel cannot proceed to another port, or return, without forfeiting the contract, is making a policy of insurance a feeble and narrow contract, and one that is altogether inadequate to the purposes which the parties to it propose, and that affords but a part of the indemnity which its words seem to import.

The parties to a policy are always understood and said to mean by their contract, not only that any specific damage to the ship or cargo shall be paid for by the insurers, but also that the property insured shall not be prevented by the perils insured against from arriving at the port of destination. This latter proposition is laid down as a first principle of the law of insurance in innumerable instances, and never contradicted. And without calling this proposition in question, it seems to be difficult to comprehend how an absolute interruption and destruction of the voyage by a peril insured against, is not a loss within the policy.

But the holding this loss of the voyage to be a loss within the policy, does not prevent the assured from waiving it. He may at any time deviate from the voyage, and by undertaking a new adventure discharge the insurers from all subsequent liability. But if he seeks another port of discharge, or returns to the port of departure, not by way of speculation and from choice, in the prosecution of a new adventure, but as a measure of necessity, or as a proceeding which, on the whole, presents the fewest disadvantages, it seems to be precisely equivalent to saving the remnants of the ship and cargo after shipwreck.

The other cases in which the voyage was abandoned, not on account of the interdiction of trade, or the blockade of the port of destination, but from the danger of being captured by the enemy, seem to depend upon very much the same principles. If the voyage is abandoned to avoid the danger of certain and inevitable capture, to which the property would be exposed by the vessel's pursuing her course, or on account of a danger of this sort so great that it would be rashness and unjustifiable conduct on the part of the captain to proceed on the voyage, it does not appear why the voyage is not as much lost by the risk of capture, as if the property had been actually captured.

The event of the vessel's being prohibited entry at the port of destination is provided for, in some instances, by giving the vessel liberty in such case to enter some other port. A vessel being insured to Amsterdam with liberty, if turned away, to enter a *neighbouring* port; London was held to be a *neighbouring* port within the meaning of the policy. There was however no other port nearer to Amsterdam, which the vessel could safely enter at the time.⁽¹⁾

In case of insurance against all 'unlawful arrests, restraints, and detentions,' it was insisted, in behalf of the assured, that the

(1) *Fergusson v. Phœn. Ins. Co.* 5 Bin. 544.

Liberty to go to another port in case of the port of destination being closed.

Unlawful arrests, restraints, &c.

(1) *McCall v. Mar. Ins. Co.* 8 Cranch, 59. qualification of 'unlawful' applied only to 'arrests,' and not to 'restraints and detainments;' but the court held that it extended to these also.(1)

Under a policy in this form the insurers were held to be liable for a total loss on a neutral cargo of a vessel that sailed from Baltimore, and was prevented from proceeding on her voyage by a blockading squadron stationed at the mouth of Chesapeake Bay, the blockade of which was instituted after the vessel sailed. It was the opinion of the court that the blockade did not, by the law of nations, 'According to modern usage, extend to a neutral vessel, found in port; nor prevent her coming out with a cargo which was on board when the blockade was instituted; and that if the vessel was restrained from proceeding on her voyage, by the blockading squadron, the restraint was unlawful.'(2)

(2) *Olivera v. the Un. Ins. Co.* 3 Wheat. 183.

Section 10. *Risk from Prohibited and Contraband Trade.*

It has been intimated above, and will subsequently more fully appear, that where a loss, though immediately caused by a peril insured against, arises wholly on account of a peril not insured against, it is not a subject of indemnity. Although captures and seizures are among the perils insured against, yet if a capture or seizure take place through the fault of the assured, it is not a loss within the policy. Upon the same principle, if a capture or seizure take place on account of contraband or prohibited trade, the insurers are not liable for the loss, unless they assume the risk arising from such trade.

(3) 1 Emer. 684. c. 12. s. 51.

Under the common form of the policy, without any exception of the risk from illicit or prohibited trade, the insurers are liable for losses in consequence of violations of the trade laws of foreign states, if they were apprised of the intention to violate such laws, either by any thing contained in the policy, or by the known laws of the place to which the vessel is insured, or the known usages of the trade.(3)

(4) 45 Geo. III.

Insurance being made on a cargo of flour from the United States to Curraçoa, the vessel on arriving at that island was seized, and both vessel and cargo were condemned; the cause assigned in the sentence, being that the vessel was not navigated according to the provisions of the act,(4) by which the trade was opened to foreign vessels, and that she had on board articles of merchandise, which, according to that act, could not be imported in any foreign vessel. The case did not show what were the provisions of the act of parliament, nor whether the vessel had on board any other goods than flour, nor in what manner the vessel was navigated. The case before the court was therefore that of a cargo condemned for the violation of foreign trade laws, without its appearing what those laws were, or how they had been violated. It was not proved, nor could it be presumed in such a case, that the insurers were apprised of any intention to incur the risk.

The court said, 'It is generally true, that an insurer is not liable for losses arising from a breach of the trade laws of the foreign country to which the voyage insured is made; unless such risk is expressly assumed or must be presumed, by necessary implication to have been intended to be taken. It has been argued that the defendant must be understood to have taken this risk, because he was informed of the nature of the voyage. But it is well understood that some trade may be carried on at Curraçoa, and the presumption does not necessarily arise, except where none but contraband trade can be carried on.'⁽¹⁾

(1) *Parker v. Jones*, 13 Mass. Rep. 173. See also *Blagge v. New York Ins. Co.* 1 Caines, 549.

'If,' says Chief Justice Parsons, 'the assurer will expressly insure against seizure for illicit trade, or if with a full knowledge of the nature of the voyage, he will insure it without making any exception, he will be bound to indemnify the assured for the losses arising from the breaches of the trade laws of the foreign state. But although he may not take upon himself these losses, and thus be responsible for them, yet he is answerable for any other losses insured against, because the policy is not void.'⁽²⁾

(2) *Richardson v. Maine Ins. Co.* 6 Mass. Rep. 112.

As the insurers are supposed to know what trade is prohibited in a foreign port by the standing regulations there, if all trade from the port where the voyage is to commence be prohibited, it must be known to the insurers that a violation of the trade laws of such port is intended. Under these circumstances it seems, by the above cases, that the risk of a violation of the trade laws of such place will be assumed by the insurers though the policy contains no express provision to that effect. It appears also, by the preceding case of *Parker v. Jones*, that if some trade be permitted, and some prohibited, by the standing regulations, and the insurers have no reason to suppose that the voyage insured is prohibited, or is to be conducted in any respect against the regulations of the place, the insurers will not under these circumstances be answerable for the risk of illicit trade. But they have sufficient notice, and are liable for this risk when the article insured is one of those prohibited by the known laws of the place to which it is destined, or from which it is to be exported, according to the description of the voyage in the policy. Thus in the case already mentioned of a policy made in France on *silk stuffs* from Spain, the exportation of which was known to be prohibited, the insurers were held to be liable for a loss occasioned by the seizure of the goods in Spain, on account of the violation of this prohibition.⁽³⁾

(3) *Valin*, tom. 2. p. 131. h. t. art. 49.

Upon this principle it has been decided that, even where, by the policy, the insurers were not to be liable for any risk on account of prohibited trade, they were still liable for such risks on articles named in the policy. It was an insurance on 'goods or specie from New York to Curraçoa, Nevitas, Matanzas' and back, 'warranted against prohibited trade.' The vessel in returning from another Spanish colony put into Matanzas, where the specie on board was seized, as an article, the exportation of which was prohibited by the laws of Spain. The court held that as to the cargo generally, the insurers not knowing of what

(1) *Seton v.*
Del. Ins. Co.
Condy's
Marsh. 346. n.

it consisted, the contract did not indemnify the assured against illicit trade. But as the specie was enumerated, it was not within the exception, as the insurers were bound to know the general regulations of the Spanish colonies.(1)

It appears from the preceding cases that the underwriters will be answerable for the risk of an intentional violation of foreign laws, only as far as they are supposed to have been apprised of the intention of violating them. And if a loss happen from a breach of such laws, through the negligence or inattention of the master or mariners, the insurers will not be answerable for this loss, unless it come under the risk of barratry. But where a loss is occasioned by the infringement of a foreign regulation, without any fault of the assured or his agents, and which could not have been foreseen or prevented, the insurers are answerable; this, like other inevitable losses in general, is at their risk.

This was determined in a case upon a policy on a vessel 'from Newburyport to every port or place to which she might proceed, (excepting the West Indies) during the term of twelve months; it being understood that the insurers were not liable for any loss or expense arising from the violation of the existing laws or regulations of any of the belligerent powers restricting neutral commerce.' The vessel sailed for Amsterdam and was captured on the voyage by a British privateer, and sent into Bristol, whence, after being released, she sailed for Amsterdam, and arriving off the Texel was captured by a French privateer as she was about taking a pilot on board to go up to Amsterdam. The vessel was libelled for having sailed for Holland after having been carried into England, which was a violation of the Milan decree, at that time in force in Holland, but of which, it being then recent, the captain had no knowledge. The decree had been published subsequently to the date of the policy. The court decided that the exception in the policy, as to 'loss and expense arising from existing regulations of the belligerent powers,' extended only to regulations existing at the time of making the policy, and accordingly did not exempt the underwriters from the risk under the Milan decree. The case was therefore the same as if the policy had contained no such exception, and resolves itself into a loss by the violation of a foreign decree, of which the master had no knowledge before the capture, and his ignorance of which, was not owing to any negligence or fault in himself or his owners; 'there was nothing from which the knowledge of the captain could be inferred, of the exposure of his ship under the Milan decree.' It was accordingly held that this was one of the risks covered by the policy, and that the insurers were answerable for the loss.(2)

(2) *Wood v.*
N. E. M. Ins.
Co. 14 Mass.
Rep. 31.

A cargo being insured from Boston to Rio Janeiro, the vessel, in the course of the voyage, put into some port on the coast of Brazil for supplies, where she was seized, and being carried to Pernambuco was condemned, together with her cargo, on the ground of her having been destined to Rio Janeiro, with the intention of trading there in violation of the Portuguese laws. It was generally known in the United States that all trade by Ameri-

cans, at Rio Janeiro, was prohibited by the laws of Portugal; though American vessels frequently cleared out for that port, for the purpose of illicit trade. The insurers objected to paying the loss, on the ground that it was occasioned by an attempt to carry on illicit trade, which they contended was not a risk insured against in the policy.

Mr. Justice Sedgwick, giving the opinion of the court, said, 'A capture for illicit trade is not insured against, unless the risk be expressly or impliedly assumed.' But the court seemed to be of opinion that it was assumed in this case, and held that the insurers were liable for the loss.⁽¹⁾

Trade carried on in violation of the laws of a foreign state is called contraband;⁽²⁾ and so also is trade carried on in violation of the laws of the country of which the parties are subjects.⁽³⁾ But contraband more frequently signifies the trade of a neutral to a belligerent country, in arms or military stores, or his trade in any articles to a blockaded port, or besieged town of one of the parties at war. These are the two kinds of trade which we are at present considering under the name of contraband.

The risk arising from the contraband character of the goods, stands upon the same ground with that arising from prohibited trade. The circumstance of the goods being contraband, may expose the goods and also the ship, to seizure and detention. But if the underwriter does not take the risk of contraband, though he insures against seizure and detention generally, he is not liable for seizure or detention for this cause.

Chief Justice Parsons, giving the opinion of the court, says, 'If, after the war is known to exist, a ship laden wholly, or in part with munitions of war, is insured to the country of one of the powers at war, and the insurer has not insured against capture for contraband trade, the policy would not be void, but the assurer would not be holden for a loss by condemnation on account of the contraband goods. So if the country, to which the ship was destined, engaged in a war after the commencement of the voyage, the policy would not be void; but if the master, after notice of hostilities, continued his voyage, and was condemned for being bound to a port of one of the belligerent nations, with munitions of war on board, the assurer would not be liable, because he did not insure against capture for that cause.'

'It has, however, been supposed that there is a difference between the cases; for the loss in the former case arose by condemnation *jure belli*; and it is a rule that the declaration of war, or a treaty of peace, made after the commencement of the risk, does not vary the rights or obligations of the parties to the policy. The effect of the rule when applicable, is, that each party is bound by the contract, whether the perils insured against become greater or less by war or peace. The rule therefore extends only to the degree of the hazard, and not to the nature of the peril; for by the breaking out of the war the insurer becomes liable for no perils which he had not insured against;

(1) Pollock v. Babcock, 6 Mass. Rep. 234. See also Lever v. Fletcher, Park, 360; Calbraith v. Gracie, Condy's Marsh. 388. n.; Livingston v. Maryl. Ins. Co. 7 Cranch, 506.
(2) Poth, n. 58; 6 Mass. Rep. 112.

Risk of Contraband.

(3) Us & Cout. de la Mer. P. 3. a. 6. n.; Marsh. 78.

although the perils insured against become much greater by this event.'

'The other description of goods, contraband of war, includes all neutral merchandise bound to a port known to be blockaded. If before the commencement of the risk, the port is known to be blockaded, the assurer does not insure against condemnation for contraband trade, the policy is good as to all the risks insured against; but the assurer is not responsible for any loss arising from such condemnation.'⁽¹⁾

(1) 6 Mass.
Rep. 115.

The liability of the underwriter for the risk, arising from the contraband character of the goods, depends upon the same circumstances as his liability for the risk occasioned by violating foreign trade laws. If it appear from the description of the goods insured, or any provision in the policy, or from the circumstances under which the voyage is commenced, that the risk, arising from the contraband character of the property insured, is one of those contemplated by the parties as the subject of indemnity, the insurers will be answerable for losses on this account.

Insurance was made on goods for a voyage from New York to Havana. The goods insured were not particularly described in the policy, nor was any representation made to the insurers as to the kind of goods. The sum of sixteen thousand dollars was insured generally 'on the cargo, not warranted.' The condition that the goods were *not warranted* seemed to imply that the insurers were to assume some risk as to their character, and this risk, whatever it was, seemed to relate to their character as contraband, for the goods were represented to be the property of particular persons, and it must accordingly have been known whether they were neutral or not. The goods consisted partly of duck, ticklenberghs, cordage, ratlines and twine, which were condemned in the British vice-admiralty court, at New Providence, as contraband of war. It appeared that the importation of these, among other goods, was specifically permitted by a proclamation of the government at Havana. Mr. Justice Kent said, 'The cargo was shipped to Havana in consequence of a proclamation of the governor of that place, enumerating certain articles (of which articles the present cargo consisted) which might be imported in American bottoms. This proclamation was a public act, materially affecting the American trade, and it may be inferred that it was publicly known. If that be the case, we can hardly presume otherwise than that the underwriters must have known, and need not have been told, that the cargo consisted of particular articles enumerated in the proclamation.' Mr. Justice Lewis said, 'The cargo consisted of the very articles to which the permission extended; here then was sufficient to have put the insurers on their guard, and if they did not choose to inquire, it is presumable that they intended to take the risk.'⁽²⁾

(2) Seton v.
Low, 1 Johns.
Cas. 1.

These two judges, and the others, who gave opinions in this case, assumed, very distinctly and explicitly, that if the insurer is informed by the policy, or otherwise, what kind of goods he

res, he takes the risk of their being seized and condemned contraband, unless this risk is unnecessarily incurred or incurred by the fault of the assured, or of those for whose conduct he is answerable.

This doctrine was subsequently recognised by the same court,⁽¹⁾ and was adopted and confirmed by the court of errors of the same state.⁽²⁾ It is a consequence of this doctrine, not only acknowledged in the cases just referred to, that if it appear by the policy or otherwise, that the insurer waives being exempted of the kind of goods insured, and so waives the right of making any exception on this account, he assumes the risk arising from their being considered contraband; it being understood, no doubt, that the loss, on account of contraband, is not occasioned by the fault of the assured.

The courts in Massachusetts and New York have assumed that neutrals may lawfully trade to a blockaded port, or supply a belligerent with munitions of war. Some doubt may perhaps be entertained respecting this doctrine;⁽³⁾ but admitting it to be correct, the only question, in determining whether the insurer is answerable for the risk on account of contraband, is, whether it was informed by the policy, or by express representations, that the insured were insured, or any circumstances in the knowledge of the assured, which might expose the property to detention or seizure as contraband of war. This makes it a question of representation in one sense; that is, if the insurers have no ground to object, on account of the concealment or misrepresentation of facts, they assume the risk arising from contraband, as it is not voluntarily superinduced by the assured. But according to Chief Justice Parsons's view of this subject, taken in connection with the doctrine adopted in New York, it is not, in the ordinary sense, a question of representation and concealment, for he says that the policy is not void though the risk of contraband remains with the assured.

If the insurers are held to assume the risk arising from the circumstance of the goods being in fact contraband, provided there is no misrepresentation, or concealment, or other fault of the assured, there is still stronger reason why they should be answerable for losses by the seizure of the property as contraband, when it is really not so. Accordingly in case of the condemnation of property for a violation of a blockade, when there is in fact no legal existing blockade, the insurers were held to be liable for the loss.⁽⁴⁾

(1) *Skidmore v. Desdoity*, 2 Johns. Cas. 77; *Juhel v. Rhinelander*, 2 Johns. Cas. 120.
(2) *Rhinelander v. Juhel*, 2 Johns. Cas. 487.

(3) *Supr.* 39.

(4) *Sawyer v. Maine F. & M. Ins. Co.* 12 Mass. Rep. 291.

Section 11. Other Perils. General Clause.

The preceding risks are specifically enumerated in the common form of marine policies. Although the indemnity thus stated is very comprehensive, the parties in some instances create other particular risks, or specify the kind of damage arising from the usual risks, for which indemnity shall be made.

(1) *Bell v. Bell*, 2 Camp. 475.

Insurance was made in England on the expenses of a voyage, or in effect upon the freight, with a stipulation, 'that if the ship should not load a cargo at Riga by the act of the Russian government, the assured were to receive a total loss.' (1)

(2) *Perkins v. N. E. M. Ins. Co.* 12 Mass. Rep. 214.

A license of trade from the enemy was insured, in Massachusetts, among other risks, 'against its being destroyed or rendered useless by the ordinary perils of the seas, fire or otherwise,' and it was rendered useless by being endorsed by a British officer, who, in the course of the voyage, boarded the vessel on board of which it was insured; and this was held to be a loss within the policy. (2)

After the enumeration of the particular risks, the policy usually contains a general clause, by which the subject is insured against 'all other perils, losses and misfortunes which shall come to the hurt, detriment, or damage of the said goods, or ship, &c. or any part thereof.' This is the old form of the clause which is now used in the greater number of policies; but in some, the expression is, 'all other losses, &c. for which the insurers are liable, according to the rules and customs of insurance,' in the place where the policy is made; others say, 'all other losses, &c. for which the insurers are legally accountable.' But the old form has been so much restrained by construction, that any express qualification of the clause seems to be of very little importance or effect.

(3) *Goix v. Knox*, 1 Johns. Cas. 337. See also *Skidmore v. Deadoity*, 2 Johns. Cas. 77.

Where the written part of the policy contained a clause by which the insurance was declared to be 'against all risks,' the court in New York said, 'This expression is vague and indefinite, but if we allow it any force it must be considered as erecting a special insurance and extending to other risks than are usually contemplated. We are inclined to apply it to all losses except such as arise from the fraud of the assured.' (3) In England the general clause seems to be used without any express modification, and according to the old form, which is adopted also in the greater number of policies in the United States. But it is construed to extend only to perils of the same kind—*ejusdem generis*—with those enumerated. Thus in case of dollars being thrown overboard, to prevent their falling into the hands of the enemy when the ship was captured, the judges thought the insurers liable under this general clause, as capture was one of the enumerated perils, and this loss was incidental to it, or *ejusdem generis*. (4)

(4) *Butler v. Wildman*, 3 B. & A. 398. See also *Phillips v. Barker*, 5 B. & A. 161. (5) *Cullen v. Butler*, Park. 105. S. C. cited 3 B. & A. 403.

Damage by being fired into through mistake, was brought under the same clause, as being *ejusdem generis* with the perils of the seas. (5)

This explanation is not very definite, but it shows at least that the courts think this clause is to be very much controlled and restrained, and that it adds very little, if any thing, to the liability assumed by the insurers under the other stipulations of the policy.

Section 12. Remote and Consequential Losses.

It is a rule that the insurers are liable only for the direct, and not for the remote and *consequential* losses occasioned by any peril in the policy. But what damage is direct, and what consequential, is often a difficult question to determine. Under a policy free from losses by 'illicit trade with the Spaniards,' the insurers are exempted from losses by 'seizures to prevent illicit traffic as well as seizures to punish it;' (1) which shows that a loss comes under a particular risk, not merely when it is a consequence that follows the actual incurring of the risk, but when it can be fairly attributed to the risk, and is occasioned by it, or arises directly on account of it.

(1) *Higginson v. Pomeroy*, 11 Mass. Rep. 112.

A vessel being compelled by sea-damage to put into Martinique to repair, for which purpose it was necessary to discharge the cargo, a part of which consisted of porter and claret, these articles being liable to be spoiled by the heat of the climate, were necessarily sold on this account. The loss from the necessity of selling the porter and claret was held not to be such a consequence of the perils of the seas, by which the vessel had been damaged, as to render the insurers of these articles liable for this loss. (2)

Porter and claret sold to prevent its being spoiled by the heat.

Where by the terms of a policy on slaves the insurers were liable for 'mortality by mutiny,' and some of the slaves were killed at the time of a mutiny by being fired upon, others afterwards died of their wounds, and others chose a voluntary death by fasting, or died through despair, and the sale of the survivors was injured, and the price of them reduced by the circumstance of the mutiny having taken place; Lord Mansfield instructed the jury that the underwriter was liable for the loss of those killed during the mutiny, and also those who afterwards died in consequence of their wounds; but he said, 'I think the underwriter is not answerable for the loss of the market, that is a remote consequence,' and he was of opinion also that the underwriter was not answerable for the loss of such as died by fasting, or through despair. (3)

(2) *Gould v. Shaw*, 1 Johns. Cas. 293; 2 Johns. Cas. 442.

Loss of slaves who die of despair on account of the failure of a mutiny.

Where a voyage was unusually prolonged by bad weather, and contrary winds, and thereby the ship came to be short of water and provisions, and on this account a part of the slaves were thrown overboard; this was held not to be a loss by perils of the seas, for the loss was not a direct consequence of those perils. (4)

(3) *Jones v. Schmoll*, Park, 97; 1 T. R. 130. n. See also 2 Valin, h. t. a. 11, 15; Emer. c. 12. s. 10; Poth. h. t. No. 66, Estrangin's note.

Slaves thrown overboard on account of the vessel's being short of provisions.

A vessel and cargo were insured from the United States to Great Britain. Before the vessel left the United States she was arrested by an embargo, imposed for ninety days, and before the expiration of that time, war was declared against Great Britain, whereby the voyage was rendered unlawful. The question was, whether the voyage was lost in consequence of this detention. Mr. Justice Sewall, in giving the opinion of the court, said, 'The declaration of war, which defeated the voyage, was in no sense a consequence of the embargo;' and it was ac-

Detention by embargo followed by war.

(4) *Tatham v. Hodgson*, 6 T. R. 656.

cordingly held that the insurers were not liable for the loss of the voyage.(1)

While the ship is detained by capture, the port of destination is blockaded.

(1) *Delano v. Bed. Mar. Ins. Co.* 10 Mass. Rep. 347.

(2) *Barker v. Blakes*, 9 East, 283.

On account of detention by capture, the vessel is denied admission at the port of destination.

(3) *Savage v. Pleasants*, 5 Bin. 403.

Damage accrues in consequence of an epidemic prevailing at a port where the ship puts in.

(4) *Williams v. Smith*, 2 Caines, 1.

Loss by raising funds upon disadvantageous terms to repair damage.

(5) *Furneaux v. Bradley*, Park. 257; *Patrick v. Com. Ins. Co.* 11 Johns. 13; *Peters v. Phoen. Ins. Co.* 3 Serg. & Rawle, 25.

Damage consequent upon shipwreck or stranding.

A cargo being insured from New York to Havre de Grace, the ship was arrested and carried into England, where she was detained till after the port of Havre was declared by the English government to be in a state of blockade. After the declaration of blockade, the ship, and the goods insured were released, but the ship could not proceed to the port of destination on account of the blockade. The court said that the assured, to entitle himself to recover for a total loss, must show 'that a loss of the voyage was occasioned by the detention,' and they were of opinion, that 'the impossibility of prosecuting the voyage, which arose during, and in consequence of the detention, might be properly considered a loss of the voyage.'(2)

Under a policy on goods from Philadelphia to Antwerp, the ship was captured by a British privateer and carried into Plymouth, but was soon released and permitted to proceed; she was however prohibited entry at Antwerp, on account of having been thus detained by a British vessel and carried into Plymouth. Chief Justice Tilghman and Brackenridge, J. were of opinion, upon the authority of *Barker v. Blakes*, that the loss of the voyage, that is, the prohibition of entry at Antwerp,—was a consequence of the capture and detention, which were insured against.(3)

A vessel that put into Cadiz was delayed there by an epidemic, on account of which, damage accrued; Mr. Justice Kent said, 'The damage resulting from the pestilence at Cadiz, is covered by the policy. It is not requisite to decide absolutely whether a pestilence is a peril directly within the policy. It formed a sound excuse for delay at Cadiz, and if a consequence of that delay was a deterioration of the subject insured, the insurer must be answerable for the loss.'(4)

Among the other consequences of damage to the ship which renders repairs necessary, may be that of putting into a port, where it is difficult or impossible to procure materials and workmen to repair the ship, or where the expenses of repairs are very high, or may be enhanced by the necessity of procuring funds by drawing bills at a discount, or otherwise upon disadvantageous terms, and by making sacrifices. All these expenses, losses and disadvantages, are considered to be among the direct consequences of the damage, and some of them come under the provision, as to 'suing, labouring, &c. for the safeguard of the property.' That the risk of being driven ashore, or necessarily putting into a place where workmen and materials cannot be found, is among the risks included in the common form of the policy, has never been questioned;(5) and the allowance of the premium necessarily given for money, or the discount on the master's drafts, is a matter of daily practice in adjusting losses.

In case of the stranding or shipwreck, the insurers on ship and goods are respectively liable, not only for the damage which is done to the subject specifically by the disaster, and by plun-

er or other inevitable casualty on shore,(1) but also for all the expense incurred for the purpose of saving the goods or getting the ship afloat.(2) These expenses may also be recovered under the clause authorizing the assured to sue, labour and travel for the safeguard of the property. The unavoidable loss by plunder of the property driven ashore, is a direct consequence of the shipwreck or stranding, for which the insurers against sea-risks are answerable.(3) And the loss of the boat, as well as damage to the ship or tackle, by shipwreck or stranding, is covered by a policy on the ship against sea-risks.(4)

In a policy of reinsurance the reinsurer having notice of a loss, under the original policy, and neglecting to adjust the same, is liable for all the expense reasonably incurred by the reassured in resisting the claim for a loss; and among these expenses are included the costs of defending the suit brought on the original policy. The notice to the reinsurer does not affect his liability for the amount of the loss recovered on the original policy, for which he is equally liable without notice; but it may be of some importance in enabling the reassured to recover the expenses of defending the suit on the original policy. When these expenses are incurred for good cause they are considered a direct consequence of the event insured against.(5)

(1) *Bondrett v. Hentigg*, 1 Holt. 149.
(2) 1 Mag. p. 76. s. 64.

(3) *Stevens on Av.* 155; *Poth. h. t. No.* 55.

(4) *Stevens on Av.* 153.

Expense of resisting the claim on the original policy is a part of the loss in reinsurance.

(5) *Hastie v. De Peyster*, 3 Caines, 190.

Section 13. Concurrence of Different Perils.

If a loss is occasioned by different perils it is to be attributed to that by which it is more immediately occasioned; *causa proxima spectatur*. If the different perils are both insured against, this rule is only of importance in regard to the mode of declaring in the action for the loss; but if one of the risks only is included in the policy, the application of this rule determines whether the insurers are liable. It ought therefore not to be applied, except in cases where the loss is exclusively occasioned by one of the perils, or where it is impossible to distinguish how much of it is occasioned by one peril and how much by the other, since the rule supposes the perils insured against are blended with those not insured against, and if one or the other is considered the leading and efficient cause of the whole loss, it operates to the prejudice of one of the parties. The cases decided under this rule will show that it is doubtful and uncertain in its application, which furnishes another reason why it should not be resorted to, except in cases that cannot possibly be decided upon any other principle.

Lord Ellenborough says, 'If a ship meet with sea-damage, which checks her rate of sailing, so that she is taken by an enemy from whom she would otherwise have escaped, though she would have arrived safe but for the sea-damage, the loss is to be ascribed to the capture and not to the sea-damage, and this upon the principle that *causa proxima non remota spectatur*.'(6)

(6) *Livie v. Janson*, 12 East, 648.

A ship being captured in consequence of delay by perils of the seas, it is a loss by capture.

Barratrous deviation and subsequent loss by sea-damage or capture.

(1) *Vallejo v. Wheeler*, Cowp. 155.

(2) *M'Intyre v. Bowne*, 1 Johns. 229.

The ship is wrecked by barratrous conduct.

(3) *Heyman v. Parish*, 2 Camp. 149.

(4) *Hagedorn v. Whitmore*, 1 Stark, 157.

The ship is taken out of her course by an excepted peril and then lost by one of the risks enumerated in the policy.

The ship is taken out of her course by a peril insured against, and then lost by an excepted peril.

In case of a barratrous deviation and subsequent loss by sea-damage, though there was no direct connection between the two, Lord Mansfield said, 'there is a great deal of reason to say that the loss sustained was in consequence of the alteration of the voyage.'⁽¹⁾

A vessel being insured from Trinidad to New York the master barratrously deviated from the course of the voyage, and after this deviation the ship was captured. This was held to be a total loss by barratry, which was in effect holding that the capture was a direct consequence of the barratry, though there seems to have been no immediate connection between them.⁽²⁾ But this decision went merely to the mode of declaring for the loss, as it does not appear that capture was not insured against.

A ship being wrecked in consequence of the barratrous conduct of the captain, Lord Ellenborough considered it, as to the purpose of declaring in the action for the loss, to be a loss either by perils of the seas or by barratry.⁽³⁾ But undoubtedly the insurers are not liable for such a loss, unless they insure against barratry.

A vessel being arrested by a public ship was compelled to make a press of sail to keep company with the public ship, in consequence of which her cargo was damaged. Lord Ellenborough said, that, for the purpose of declaring in the action, this might be considered a loss either by detention or perils of the seas;⁽⁴⁾ but to render the insurers answerable for such a loss, detention must, no doubt, be one of the perils insured against.

A cargo being insured against the usual perils, 'French risks excepted,' the vessel was captured by a French privateer, and recaptured by a British frigate, and carried into Jamaica, where the cargo was condemned as French property. The insurers were held not to be liable for the loss. Mr. Justice Radcliff said, 'The terms of the exception must mean that the insurer is not liable for any loss by the acts of Frenchmen.'^(a)

The commissions of the assured, as consignee of the ship, being insured in a policy by which the underwriters were 'exempted from all loss that might arise from the ordinary perils of the seas,' with an agreement on the part of the assured not to abandon until condemnation, or ninety days after capture; the ship was captured, and, twelve days afterwards, being in possession of the captors on the course to Halifax for adjudication, was lost by the perils of the seas. Parker, C. J. giving the opinion of the court, said, 'If the ship had arrived she might have been restored. The assured had stipulated not to consider the capture alone as a loss, but to wait ninety days for the event, unless

(a) *Roget v. Thurston*, 2 Johns. Cas. 248. The rules of the Pepsco Insurance Company of Baltimore provide, that in case property insured against sea-risks only is captured, the risk shall cease until the property, in case of its being released, shall reach the nearest point, in the due course of the voyage, to that at which it was captured.

a condemnation should sooner take place. In twelve days she is lost by the perils of the seas. She was then at the risk of the assured, because the loss happened within a time in which he had stipulated not to throw the loss by capture on the underwriters; and because the loss was not the immediate and necessary effect of the capture. Nor is it certain that it may be attributed to that at all.'(1)

(1) *Law v. Goddard*, 12 Mass. Rep. 112.

A ship being wrecked is then seized.

A ship being insured 'free from American condemnation,' attempted to sail from New York during the night, in contravention of an embargo then in force, but was driven by a body of ice and the wind, upon the rocks on Governor's Island. The master and crew made every exertion to get her off, but without success. A large hole was made in her side by the ice, and her bottom was broken by the rocks, in consequence of which the water rose four feet in the hold, and she fell on her side when the tide left her. She was afterwards seized and condemned for a violation of the embargo. Lord Ellenborough said, 'As it appears to me this case falls within the principle that *causa proxima non remota spectatur*. It seems to be useless to be seeking about for odds and ends of previous and partial losses when at last there was one overwhelming cause of loss, which swallowed up the whole subject matter. The total loss by the subsequent seizure and condemnation, takes away the right to recover in respect to the previous partial loss by sea-damage. Where the property deteriorated is afterwards totally lost to the assured, and the deterioration becomes ultimately a matter of perfect indifference to his interests, he cannot make it a ground of claim upon the underwriters; he can have no claim to indemnity where there is ultimately no damage to him from any peril insured against. Suppose the ship and cargo to be damaged in the early part of the voyage by sea-perils, and afterwards wholly destroyed by fire, is not its previous deterioration wholly immaterial? There may be cases in which, though a prior damage be followed by a total loss, the assured may nevertheless have rights and claims in respect to that prior loss. Actual disbursements for repairs, prior to a total loss, are of this description, unless they are more properly covered by the authority of suing, labouring, &c.'(2) But the assured might, on the ground assumed by the court, have claimed a total loss, since the seizure was a matter of indifference after the shipwreck. As the loss by sea-damage might have been distinguished from the loss by seizure, there seem to have been very strong reasons for making this distinction.

(2) *Livie v. Janson*, 12 East, 648. But see *Coit v. Smith*, 3 Johns. Cas. 16; and *Lawrence v. Aberdeen*, 5 B. & A. 107.

Chief Justice Kent says, 'Suppose, the policy against capture only, and the vessel was captured and then shipwrecked while in the hands of the captors, I should think the assured might maintain that his right to recover for a total loss attached upon the capture, and that the subsequent casualty was one with which he had no concern.'(3)

Case of a shipwrecked after capture.

(3) *Schieffelin v. New York Ins. Co.* 9 Johns. 21.

A ship and cargo being insured in a policy by which 'the underwriters were exempted from capture,' the vessel met with bad weather which rendered it necessary, for the general safety,

A ship and cargo being damaged by

perils of the seas are afterwards captured.

to throw over the anchors and cables and a third part of the cargo, and the hull was so much damaged as not to be worth repairing; after which the vessel was captured. It was held that the policy covered the loss of that part of the cargo which was thrown overboard, but not the damage sustained by the vessel before the capture. The court said it was a loss of the vessel by capture, unless the damage by perils of the seas to three fourths of the value distinguished this case from *Green v.*

(1) *Supr.* 212.

(2) *Supr.* 287.

(3) *Rice v. Homer*, 12 Mass. Rep. 230.

The ship being stranded and then burnt, it is a loss by perils of the seas.

Emslie, (1) and *Livie v. Janson*, (2) and made it a total loss by those perils. 'We have been struck with this distinction and have not abandoned it without much hesitation, because technical rules only seem to prevent the assured from recovering.' But the court said, if this had been an insurance against capture only; notwithstanding the sea-damage, the insurers would have been liable for a total loss. 'When the subject matter is wholly lost by a subsequent peril, the antecedent partial loss is merged and gone, so that no action can be founded upon it, no repairs having been actually made.' (3)

In a policy on the ship 'the assurers took no risk in port but sea-risk.' The ship was driven on shore, opposite to the Isle of Leon at the port of Cadiz, at high water, the water being sixteen feet higher than it had been known to be before. When the gale abated she lay high and dry nearly two hundred yards from high water mark, and was buried in mud and sand to within three streaks of her bends. The master believed the ship to be bilged, but could not ascertain the fact. She could not have been got off without taking her in pieces, or digging a canal, which would have cost more than the value of the ship. Some French soldiers from a neighbouring battery set fire to the ship in this situation, whereby she was wholly consumed. Chief Justice Kent, giving the opinion of the court, said, 'The place where the ship lay at anchor when the storm arose, and the place where she was stranded, were both of them equally in port. The only question is whether the loss was, or was not,

(4) *Patrick v. Com. Ins. Co.* 11 Johns. 9.

The cargo of a stranded ship being burnt, it is not a loss by perils of the seas.

(5) *Patrick v. Com. Ins. Co.* 11 Johns. 14.

by sea-risk.' The jury had given a verdict for the assured on the ground that it was a loss by sea-risk, and the court did not think proper to set it aside. (4)

But under a policy, with the same exception, on the cargo of the same ship, and which was burnt in the ship, it was the opinion of the court that 'as the cargo was not injured by the stranding, the loss of it must be attributed to the act of the French, which was a peril not insured against.' (5)

Section 14. Loss upon one Subject by Damage to Another.

Under the principle that the insurers are not answerable for the remote consequences of perils insured against, the question arises how far a damage or loss of one subject of insurance, will constitute a loss under a policy upon another. If the ship be wrecked or disabled from pursuing the voyage by the perils insured against, it is, as we shall see hereafter, a total loss of

ship and freight. The same disaster may be a total loss of the cargo, and the profits and commissions that would have accrued upon it, though the whole of the cargo is saved, and may have sustained no damage, if no other vessel can be found at or near the place where it is landed, within a reasonable time, and at a reasonable expense, for carrying on the cargo to the port of destination.

But it is a subject of some doubt how far a loss of the ship is a partial loss on the goods, by subjecting the shipper to additional expense of freight by another vessel.

A ship having been captured was sold, together with the cargo, and the proceeds of both retained to await a final adjudication. Both ship and cargo were finally restored, but a *pro rata* freight was decreed to the owners of the ship out of the proceeds of the cargo. The shipper claimed of his underwriters the amount of freight so decreed. Lord Mansfield said, 'As between the owners of the goods and the underwriters upon the cargo, the latter have nothing to do with the freight; they have not engaged to indemnify the owner of the goods against it.'(1)

In regard to the same question, Mr. Justice Story, giving the opinion of the court, said, 'As between the assured and underwriter on the cargo, the latter is in no case responsible for the payment of freight, whether there be an abandonment or not. It is a charge on the cargo against which he does not undertake to indemnify the owner.'(2)

It is to be observed that the judges had in view cases where only one freight was paid, and not the case where one entire freight had been earned, and an additional expense of freight incurred on account of the perils enumerated in the policy upon the goods. A case of this latter description has occurred in New York.

A ship being captured was soon released, but the cargo detained for further proof. On the release of the ship the captain offered to carry on the cargo to the port of destination, which was impracticable on account of its detention, but it was held that the offer of the master to carry on the cargo, entitled the owners to entire freight. The cargo was afterwards released, and the owners of it, after having paid a full freight to the ship on which the goods were originally shipped, were obliged to pay an additional freight for the transportation of their goods to the port of destination by other vessels. The insurers of the cargo were held to be liable for this extra freight.(3) Mr. Justice Wild, speaking of this case, says, 'No one, I think, can doubt it was correctly decided.'(4)

A ship bound on a voyage from Siam to Hamburg was wrecked at the Isle of France, where the captain procured a Dutch vessel to carry forward the greater part of the cargo to Hamburg. Under a policy upon the ship and cargo the assured claimed of the insurers a reimbursement of the amount of freight paid to the Dutch vessel. The freight paid to this vessel did not amount to so much as would have been due to the owners of the original ship, according to the charterparty, for

Whether extra freight is a loss under a policy upon goods.

(1) *Baillie v. Moudigliani*, Park, 90.

(2) *Case v. Balt. Ins. Co.* 7 Cranch, 362. But see 1 Val. 65. tit. Du Fret. a. 11; 1 Emer. 428. c. 12. s. 16; Poth. tit. des Chartes-parties, n. 68. Code de Com. liv. 2. t. 8. n. 107.

(3) *Mumford v. Com. Ins. Co.* 5 Johns. 262.

(4) 17 Mass. Rep. 476.

the part of the voyage remaining to be performed after the shipwreck. Mr. Justice Wild, giving the opinion of the court, said, 'If however the Dutch ship had cost more, the underwriters would not have been liable; because the extra expense would have fallen upon the ship-owner, and not upon the owner of the goods. If the ship-owner had refused to provide a new ship he could have claimed no freight. We must consider the master as acting for the ship-owner in hiring the Dutch ship; and that the owner of the goods was bound to pay only the customary freight from Siam to Amsterdam. The owner might have insured the freight; but surely his having neglected so to do will not enlarge the responsibility of the underwriters on the cargo.'⁽¹⁾

(1) *Dodge v. Union Mar. Ins. Co.* 17 Mass. Rep. 471.

The rule on this subject as laid down by Chancellor Kent, is, that the underwriters are liable for the excess of the freight which the assured on the goods has been obliged to pay, in consequence of the perils insured against, over the amount which would have been due by the original charterparty.⁽²⁾ or over the customary freight for the same voyage where there was originally no express agreement, as in case of the goods belonging to the owner of the ship.

(2) *Searle v. Scovell*, 4 Johns. Chan. Rep. 218.

A loss of the cargo is not a loss of the voyage under a policy on the ship.

Loss of ship or goods is a loss of freight.

(3) *Alexander v. Balt. Ins. Co.* 4 Cranch, 370; *Kulen Kemp v. Vigne*, 1 T. R. 304.
(4) *Barclay v. Stirling*, 5 M. & S. 6; *Whitney v. New York Firem. Ins. Co.* 18 Johns. 208.

A ship forfeited by an act of barratry, is not seized until after the risk ends.

The loss of the cargo, whereby the voyage is no longer worth pursuing, is not a loss on the ship. This is not a breaking up of the voyage for which the insurers are liable.⁽³⁾

But the damage or loss of the cargo, whereby the ship is prevented from earning freight, is a loss on freight; for the peril operates as directly on the freight by a damage to the goods by the transportation of which the freight is to be earned, as by a damage to the ship which is to earn it.⁽⁴⁾ Thus under a policy on freight 'free from seizure,' the freight was lost by a seizure of the goods, and the insurers were held to be protected from the loss by the exception.^(a)

Section 15. *What Losses are within the Period of the Risk.*

It is a general rule that the insurers are answerable only for those consequences of a loss which take place before the termination of the risk, and in some instances where the cause of a loss has existed during the risk, but has not resulted in an actual loss until after its expiration, the insurers have been held not to be liable.

The forfeiture of a ship insured was incurred during the continuance of the risk by the barratrous act of the master in smuggling goods, but the ship was not seized for the forfeiture

(a) 9 Johns. 19. Suppose a policy made upon the master's commissions for selling the outward cargo and investing the proceeds, and he is washed overboard in a storm, on the outward passage, whereby he is prevented from earning his commissions, is this a loss of his commissions by perils of the seas?

until after the risk had ended. The insurers were held not to be liable, as the loss had not in fact happened during the risk.(1)

A ship, that was insured for a certain time, met with an injury from a peril insured against, and received her death wound, three days before the expiration of the risk, but was kept afloat by pumping, until after the period of the risk had expired, and was then totally lost. The insurers were held not to be liable for the loss.(2) There seems however to be no reason why the insurers should not in such case be answerable for the loss which is actually sustained during the continuance of the risk. But the total loss of the ship may have been owing to her being at sea when the risk terminated, whereas, had she been near a port when the injury happened, perhaps she might have been saved and repaired at no great expense. As the insurers did not take the risk of her situation at the end of the risk, they ought not to be liable for loss on this account. But this is no reason why they should not be answerable for the amount that might have been recovered upon the most favourable supposition, in respect to the situation of the ship at the end of the risk.

In case of an insurance upon horses from Liverpool to New York, one of the horses was badly injured by a peril insured against, during a gale, a few days previous to the termination of the voyage, in consequence of which he died three or four days after being landed. Mr. Justice Radcliffe said, 'If the horse had been thus partially injured and continued to live, there can be no doubt but the insurer would have been liable for the diminution of his value. His subsequent death cannot alter the case. It is merely evidence of the extent of the injury, his death wound being received during the voyage.' Mr. Justice Kent fully agreed with the doctrine in *Lockyer v. Offley*, that 'the insurer is not liable for losses happening after the term prescribed in the policy, although in consequence of a peril in the policy. What was the condition of the cargo when landed was the only question. In this case one of the horses received a death wound during the voyage. The damages so received, as they existed at the termination of the voyage, are a proper subject of retribution. The subsequent death of the horse is put wholly out of view. I am of opinion that the assured are entitled to recover, and to the full value of the horse.' And such was the opinion of the court.(3)

A ship was delayed to repair sea-damage which was covered by the policy, and while so delayed, was arrested by a temporary embargo whereby she was detained until after the risk terminated; the insurers were held not to be liable for the loss accruing by this detention subsequently to the termination of the risk.(4)

But in case of the seizure of a ship during the risk, and its condemnation after the termination of the risk, the insurers were held to be liable for a total loss, for the seizure in itself constituted such a loss. The subsequent release of the ship might have taken away the right of abandonment, but as the ship was

(1) *Lockyer v. Offley*, 1 T. R. 252.

A ship sinks after the risk ends in consequence of sea-damage sustained during the risk.

(2) *Meretony v. Dunlop*, cited 1 T. R. 260. See also *Furneaux v. Bradley*, Park, 257.

A horse insured, receives his death wound during the voyage, but dies after being landed.

(3) *Coit v. Smith*, 3 Johns. Cas. 16.

(4) *Roche v. Thompson*, Mil. 20. *Weskett*, art. End of Voyage, &c. n. 5.

A detention of the ship that commenced during the risk continues until after the risk expires.

The ship is seized before, but condemned after the risk ends.

(1) *Dorr v. N. E. Mar. Ins. Co.* 11 Mass. Rep. 1.

A ship is with- in a hostile embargo dur- ing the risk, but not actu- ally taken possession of until after the termination of the risk.

A person whose life is insured is at sea; and not heard from af- ter the termi- nation of the risk.

A ship at sea is not heard from after the expiration of the risk.

not released, it was held that the right to abandon subsisted after the risk had ceased.(1)

A British vessel insured from Bilboa to Rouen till she had been there moored twenty-four hours in safety, arrived at Rouen where a hostile embargo had been laid upon British vessels. It seems that she was not actually taken possession of under the embargo until after the expiration of the twenty-four hours, but she had been in the power of the officers of the French govern- ment from the time of her arrival. Lord Kenyon instructed the jury, that the loss happened immediately on the vessel's ar- riving within the operation of the embargo, and so before the expiration of the risk.(2)

A life being insured from the 30th of January 1772, to the 30th of the same month in 1778, the person whose life was in- sured was at sea towards the conclusion of this period, and not being heard of afterwards, was presumed to have perished, but it did not appear whether he was lost before or after the thir- tieth of January 1778. It was a question for the jury to decide, considering all the circumstances, whether he perished within the time of the risk.(3)

The question whether the loss happened within the period of the risk, was determined in the same manner, where a ship, in- sured for a certain time, was at sea, and not heard from after the expiration of the time.(4)

(2) *Minett v. Anderson, Park*, 55. Peake, 211.

(3) *Patterson v. Mack, Marsh.* 781.
(4) *Brown v. Neilson*, 1 Caines, 525.

Risk of con- traband trade.

The excep- tion of illicit and contra- band trade extends only to the goods insured.

Section 16. *Risks Excepted.*

A policy including only a part of the usual risks, is often made in the common form, and then the excepted risks are ex- pressly specified, by inserting that the insurance is to be 'free from,' or 'warranted against,' certain risks; or some other equi- valent provision is inserted.

Under the exception of all risks on account of 'trade in arti- cles contraband of war,' if the whole or a part of the goods in- sured are articles contraband of war, and a loss takes place in consequence, the insurers are not liable for such loss.(a)

The exception of the risk of 'illicit and prohibited trade,' as well as of trade in articles contraband of war, relates to the goods insured in the policy, and not to other goods shipped by the same vessel. Where the owner of the vessel insured goods with this exception, and at the same time knew that illicit goods were shipped for the same voyage by other persons, which circumstance was also known to the underwriter, Chief Justice Lewis, in giving the opinion of the court, said, 'With a knowledge of this fact the underwriters subscribed the policy, he took the risk of all the consequences that might result to the

(a) *Johnston v. Ludlow*, 2 Johns. Cas. 481; *Lalng v. Un. Ins. Co.* 2 Johns. Cas. 174, 487. The exception of illicit and contraband trade is said to have been introduced into policies in Philadelphia in 1778. *Smith v. Del. Ins. Co.* 3 Serg. & Rawle, 82.

lawful from the illicit goods, the warranty extending to the goods only which were the subject of the policy.⁽¹⁾ And it seems that the policy will not be made void, in consequence of the shipment of illicit goods by other persons than the assured not having made known to the underwriters, though it is known to the assured.⁽²⁾

It was held in New York that the insurers were not discharged under this exception, from the payment of a loss of the cargo by an arbitrary seizure and condemnation at Antwerp, the port of destination, when it was in the jurisdiction of the French. The court considered whether there had in fact been any illicit trade, and it not appearing that there had been any, nor that the goods were condemned for this cause, the insurers were held to be liable.⁽³⁾

It is not distinctly decided in the preceding case that the insurers are liable under this exception for a loss by seizure, under a pretence of illicit trade, when in fact no such trade has been carried on or attempted. It has however been decided in Massachusetts, that under an exception of 'illicit trade with the Spaniards,' a seizure, 'whether for arrival on the coast, or for an act of traffic, are alike within the exception. A seizure to prevent traffic, as well as on suspicion of trafficking, are within the exception, as much so as the most regular confiscation for trafficking illicitly. The exception extends to every seizure and detention as a means of enforcing the prohibitions of trade.'⁽⁴⁾ A case has occurred in the Supreme Court of the United States, upon the exception of 'illicit trade with the Portuguese,' in one policy, and of 'seizure by the Portuguese for illicit trade,' in another, in regard to which exceptions the court said, the 'words ought to receive the same construction; and each exception is substantially the same.' The court considered it to be proved, that 'this illicit trade was the sole and avowed object of the voyage.' The supercargo did carry on illicit trade at Rio Janeiro, to a small amount; and an *attempt* was made to put into Para for the same purpose, which was prevented by a seizure and condemnation of the ship and cargo. Supposing this seizure to have been made for the *attempt* merely, it was contended not to be within the exception. But Chief Justice Marshall gave the opinion of the court, that, 'If the loss was occasioned by attempting an illicit trade with the Portuguese; if an actual offence was committed against the laws of that nation, and the property was condemned on that account, the case came within the exception.' But he said that 'the exclusion of illicit trade, is only an exclusion of that risk to which the trade is by law exposed.'⁽⁵⁾

It has been held in other cases that the prohibition, to bring the case within the exception, must be legal and such as the government has a right to impose;⁽⁶⁾ but it may be subsequent to the commencement of the risk under the policy.⁽⁷⁾ It seems, by these opinions, that if the property is condemned, or seized and confiscated, on pretence of illicit trade, when in fact no illicit trade had been carried on or attempted, the insurers are liable

(1) *Bowne v. Shaw*, 1 Caines, 489.
(2) *De Peyster v. Gardner*, 1 Caines, 492.

The seizure of the goods at the port of destination is held not of itself to be a proof of illicit trade.

Whether the insurer is liable for loss by seizure under pretence of illicit trade when there has in fact been no attempt to carry on such trade.

(3) *Gracie v. New York Ins. Co.* 13 Johns. 161.

(4) *Higginson v. Pomeroy*, 11 Mass. Rep. 104. See also *Smith and Buchanan v. Del. Ins. Co.* Wharton's Dig. p. 324. h. t. 63.

(5) *Church v. Hubbard*, 2 Cranch, 187.

(6) *Smith v. Del. Ins. Co.* 3 Serg. & Rawle, 82; *Faudel v. Phoen. Ins. Co.* 4 Serg. & Rawle, 29.

(7) *Smith & Buchanan v. Del. Ins. Co.* Whart. Dig. 324. h. t. n. 64.

for the loss, notwithstanding the exception; and this accords with the decision in New York, above cited.^(a)

Under the exception of 'loss on account of trade in articles contraband of war,' it appeared that the British Vice-admiralty Judge, at New Providence, had condemned some blocks of tin and boxes of tin plates, as being articles contraband of war. It was provided in the policy that the parties should not be concluded by the judgment of a foreign court. It was held in New York that the tin blocks and plates were not contraband of war; and the court said, 'it cannot be the intention to throw the loss upon the assured when there could be no fault in him—when no illicit trade or contraband existed in fact—merely because a pretence of that kind is set up to cloak the condemnation.'⁽¹⁾

(1) *Johnston v. Ludlow*, 1 Caines, xxix. See also *S. C.* 2 Johns. Cas. 481.

In a case upon a policy containing the same exception, where the vessel was refused permission to enter at the port of destination on account of an alleged insufficiency of the papers, Livingston, J. giving the opinion of the court, said, 'A denial of entry at the port of destination appears to me, after considerable reflection and many doubts, not to be a loss within this policy which contains an agreement, that, for a seizure or detention on account of prohibited trade, there shall be no remedy. How can the underwriters, who do not assume the greater risk of seizure, be answerable for a smaller one proceeding from the same cause?'⁽²⁾ It does not distinctly appear whether the court considered the fact to have been proved that the entry was *prohibited by the laws* of the place, but this rather seems to have been assumed, for the judge speaks of the trade as 'prohibited.'⁽³⁾

(2) *Suydam v. Mar. Ins. Co.* 1 Johns. 181.
(3) See *Graham v. Penn. Ins. Co.* Condy's Marsh. 346. n.

Goods were insured from New York to Cherbourg, 'free from seizure for illicit or prohibited trade.' The ship and cargo were seized at Cherbourg under the Berlin decree, and condemned 'on the ground of a false declaration by the captain,' that he had not gone to England on the voyage. The court said, 'We have nothing to do with the pretexts for the condemnation so long as the loss was not for an illicit or prohibited trade. Going to Cherbourg, after having touched at Plymouth, was going to a prohibited port under the Berlin decree, but the mere entry into that port was not a breach of the warranty; [*i. e.* did not come within the exception.] If there had been no seizure, and the ship had been burnt in the harbour, before the goods were landed, the insurers would undoubtedly have been liable. Seizure for trading, or attempting to trade, contrary to the Berlin decree, would have brought the case within the exception. If the loss did not arise from seizure for a prohibited trade, the insurer is responsible.'⁽⁴⁾

(4) *Mumford v. Phœn. Ins. Co.* 7 Johns. 449.

Mr. Justice Washington was of opinion, that to bring a case within this exception, 'both a seizure and an illicit trade must

(a) Whether the judgment of a foreign court is conclusive of the fact of illicit trade, is a different question. If the foreign judgment is conclusive, it makes a case in which the fact of illicit trade is proved.

concur. (1) The supreme court of Pennsylvania has given a similar opinion. (2)

It was held in the same state that if the circumstance, whereby the trade became prohibited, was a consequence of a peril against which the underwriters insured, they were answerable notwithstanding the exception; as in the case of a vessel prohibited entry at Antwerp in consequence of her having been detained by a British ship, which detention was insured against. (3)

But if the prohibition of an entry at the port of destination is not considered a consequence of some peril insured against, then the insurers are not liable for a loss of the voyage by such prohibition. (4)

It has been held that if permission be given by the officers of government at a foreign port, without authority, to trade in violation of the laws of the place, such permission will not take the trade out of the exception of 'prohibited trade.' Under a policy on ten hogsheads of sugar from Antigua to New York, 'free from prohibited trade;' it appeared that the exportation of sugars from Antigua had been permitted by a special law; but after the arrival of the vessel, and before she was loaded, the President of Antigua received instructions that this permission was revoked. He however supposed that the permission would extend to the particular case, notwithstanding the revocation, and accordingly allowed the sugars in question to be exported. The property was captured during the voyage, and condemned as having been exported contrary to law. The court said, 'The loss was occasioned by a peril not within the policy; the seizure and condemnation were on account of prohibited trade. The advice of the President was unauthorized.' (5)

Under the exception of risk on account of the blockade of the port of destination, questions have arisen similar to those respecting the exception of prohibited trade, namely, whether the insurers are exempted only from losses arising from an actual violation of blockade, or from seizures, or other losses taking place on account of a pretended and alleged violation, when in fact no blockade has been violated. A ship and cargo were insured in a policy, whereby the insurers took 'no risk of blockaded port;' and the property was captured and condemned for an alleged violation of the blockade of St. Lucas. Chief Justice Kent, giving the opinion of the court, said, 'From what appears in this case the offence [viz. violation of blockade] does not seem to have been made out; and judging from what appears before us, I should deem the capture unlawful. I am aware, however, that we are not prepared to judge of its legality. But I think it sufficient for the insurers to show that the loss arose by reason of the blockade, and that we are not to inquire whether the belligerent was strictly justifiable in condemning the property for a violation of blockade. If the insurer is to take 'no risk,' he must be discharged from every risk arising from a blockaded port. The risk may arise from illegal, as well as legal captures, founded on the fact of the blockade.' But he said

(1) *Graham v. Phœn. Ins. Co. Cond's Marsh.* 346. n.

Distinction of the prohibition being a consequence of a peril insured against, or not.

Unauthorized permission of the trade by an officer of the port.

(2) *Smith v. Del. Ins. Co.* 3 Serg. & Rawle, 82.

(3) *Savage v. Pleasants*, 5 Bin. 403.

(4) *Krumbhaar v. Mar. Ins. Co.* 1 Serg. & Rawle, 281.

(5) *Tucker v. Juhel* 1 Johns. 20.

Exception of the risk of violating a blockade.

(1) Radcliff
v. Unit. Ins.
Co. 7 Johns.
38. 9 Johns.
277.

Sailing for a
blockaded
port not
knowing it to
be such.

the existence of the blockade must be made out; that is, the insurers are answerable for a loss by capture and condemnation for the supposed violation of a blockade, which did not exist.(1)

A ship was insured 'to one or more ports in the West Indies and thence to Norfolk, against all risks, blockaded ports and Hispaniola excepted.' The master sailed for Curraçoa, which was blockaded at the time, but he had no knowledge of the blockade until he was warned off, upon which he sailed for Norfolk, and was captured by a French privateer. Chief Justice Marshall gave the opinion of the court. He said, 'A voyage to Hispaniola was not insured. The assured has notice of this, and if he sail for Hispaniola, the voyage is entirely at his own risk. Other ports are within the voyage insured, if they be not blockaded. It is their character as blockaded ports that excludes them from the insurance. It is the risk attending this character which is excepted, which is the risk incurred by breaking the blockade. Sailing for Curraçoa knowing it to be blockaded, would have incurred this risk; but sailing for that port without such knowledge, did not incur it.' The loss was accordingly held to be within the policy.(2)

(2) Yeaton
v. Fry, 5
Cranch, 335.

From the preceding cases it seems to be a matter of some doubt whether an exception of the risk of illicit trade, or that arising from blockade, excludes the loss arising from a pretended illicit trade or violation of blockade, when there has in fact been no such trade or violation.

Goods known
to be prohi-
bited are spe-
cifically insu-
red under this
exception.

It has been held that, notwithstanding the exception of the risk of prohibited trade, if goods, specifically described in the policy, are insured from a port where the exportation of them is universally known to be prohibited, the exception will not be applicable to them. A policy was made on specie, among other things, from Matanzas and other ports of the West Indies to New York. The ship on her return from another Spanish port, put into Matanzas in distress, where the master was compelled to land the specie and not allowed to take it away, the exportation of it not being allowed by the Spanish laws. The insurers were held to be liable, for they were bound to know that by the general regulations of the Spanish colonies, specie was prohibited from being exported.(3) But it does not appear why the knowledge, on the part of the insurers, that the trade was prohibited, proved conclusively and against the express provisions of the policy, that the risk arising from the prohibition was assumed by the insurers.

(3) Seton v.
Del. Ins. Co.
Condy's
Marsh. 346. n.
(4) Wood v.
N. E. Mar.
Ins. Co. 14
Mass. Rep.
31.

Exception of
loss by the
violation of
existing regu-
lations.

It being provided in a policy that the insurers were not to be 'liable for any loss arising from the violation of *existing* regulations restricting neutral commerce;' the provision was held to apply only to regulations 'in force at the time of executing the policy.'(4)

Exception of
seizure in the
port of dis-
charge.

Under a policy upon the cargo of a British ship from London to any port or ports, 'free from capture and seizure in her port or ports of discharge;' the ship and cargo were seized in the river Jahde fifteen miles below Varel, where the ship was lying off and on, waiting for directions from the supercargo who had gone up to Varel for instructions from the consignees, at what place to

land the cargo. The country was under the dominion of the French government, and a French force was stationed there to prevent intercourse with the English. Lord Ellenborough said, 'The ship had gotten within what, in a general sense, and for the purpose which the contracting parties had in view, was to be considered the port of discharge.'⁽¹⁾

(1) *Jarman v. Coape*, 13 East, 394. 8. C. 2 Camp. 615.

Under a policy upon a cargo with the same exception, the ship and cargo were seized in the outer harbour of Pillau, which is also the harbour of Königsberg, whither the goods were destined. The ship lay without the bar of the harbour, about two miles out towards the open sea, from the place where ships of similar burthen usually unload a part of their cargoes, to enable them to pass over the bar. On her coming to anchor, the captain had gone ashore to report his ship, and to obtain permission to land his cargo, and to give directions in this respect; and had been ashore five or six days for this purpose before the seizure was made. Lord Ellenborough said, 'The parties knowing that the whole continent was in a state of actual or probable hostility to British commerce, their meaning undoubtedly was, that the underwriters should not run the risk of seizure in the elected place of discharge, wherever that might be.' *Le Blanc, J.* 'It seems to me that the ship being in the place which she had elected as the place to begin making her discharge, we must consider her as within her port of discharge within the meaning of the policy.'⁽²⁾

(2) *Dalgleish v. Brooke*, 15 East, 295. See also *Oom v. Taylor*, 3 Camp. 204; *Maydew v. Scott*, 3 Camp. 205.

But in other cases this exception has received a construction less favourable to the underwriters. A vessel was insured at and from Rotterdam to London, with liberty to touch at all ports, 'free from capture in port.' The ship was captured while at anchor at Ghoree Ghat, about a half of a mile from Ghoree, in an open roadstead, within the headlands which form the mouth of the river Maese. Lord Ellenborough said, if you would protect yourself by the exception, 'you must show that the ship was within some port at the time of the capture. No witness has stated that the place where she lay was within the port of Rotterdam, or of Ghoree, or within any other port.'⁽³⁾

Seizure within the headlands which form the mouth of the Maese.

(3) *Baring v. Veaux*, 2 Camp. 541. (4) *Brown v. Tierney*, 1 Taunt. 517.

Under the exception of capture and seizure in port in a policy on the ship, the insurers were held to be liable for a loss by seizure in Pillau Roads, where vessels usually discharge a part of their cargoes for the purpose of going over the bar. The court said, the ship was there 'as much at open sea as ever she had been.'⁽⁴⁾

Seizure at the place where ships usually lighten to pass over the bar of the harbour.

Under a policy on goods 'free from capture and seizure in the port of discharge;' the intended port of discharge was Wismar, on approaching which the master learned that it was in possession of the French. He came to anchor in the open sea about seven miles from Wismar, and soon afterwards some French soldiers came out from Wismar and took possession of the vessel. Ships usually discharge about four miles nearer to Wismar than the place where the vessel lay. It was held, though with some hesitation, that this was not a capture or seizure in the port of discharge, and that the insurers were liable.'⁽⁵⁾

The property is seized in the open sea about three miles from the usual place of discharging.

(5) *Mellish v. Staniforth*, 3 Taunt. 499.

In case of a policy upon goods 'free from confiscation in the port of discharge;' while the ship was lying at anchor near Pillau, her intended port of discharge, and about three miles farther out than any place where ships ever begin to discharge; she was seized by officers of the government then having jurisdiction at Pillau, and afterwards confiscated together with the cargo. Chief Justice Mansfield said, that to bring the loss within the exception, 'the capture or confiscation must begin in the port of discharge;' whereas the capture was here made *without* the port, and accordingly the insurers were held to be answerable.⁽¹⁾

(1) *Levy v. Vaughan*, 4 Taunt. 387.

A ship being insured 'free from capture in her port of destination,' which was Pillau, came to anchor over against that place on the outside of the bar, a full German mile farther out than any place where vessels ever begin to lighten their cargoes, for the purpose of going over the bar of the harbour; where she was taken by some soldiers from Pillau. Chief Justice Mansfield said, 'I have no doubt the underwriters intended to protect themselves against the loss which has occurred, but they have used terms which do not protect them. The place where the capture was made is in the open sea.'⁽²⁾

(2) *Keyser v. Scott*, 4 Taunt. 660.

Free from confiscation by the government at the port of discharge.

In the case of an insurance on goods 'free from confiscation by the government in the port of discharge,' which was Pillau, where the ship, while lying in the Roads, was boarded by Prussian soldiers from Pillau, and by Frenchmen from a French privateer, who disputed the right of possessing the prize, and this dispute was referred by the Prussian government to that of France, and decided by the court of prizes at Paris in favour of the French captors, the insurers were held to be liable for the loss. Lord Ellenborough said, 'There was no *confiscation*, which must be an act done on the part of the government of the country where it takes place, and in some way beneficial to that government.' Mr. Justice Grose said, 'The Prussian government did not confiscate, but abjured and renounced the property.'⁽³⁾

(3) *Levi v. Allnutt*, 15 East, 287.

An exception of *seizure* is equivalent to an exception of *capture*.

A ship being insured against capture only, and 'free from *seizure* in any place under the jurisdiction of Napoleon, or any power in alliance with him,' was taken by two French privateers in a place under the jurisdiction of Holland, which was then in alliance with Napoleon. It was contended in behalf of the assured, that the term *seizure* was only applicable to the arresting and taking possession of a vessel on account of some municipal regulation. But the court said, 'It is not a strained interpretation of the term *seizure*, to consider it as synonymous with capture.'⁽⁴⁾

(4) *Black v. Mar. Ins. Co.* 11 Johns. 287.

Exception of risks in port other than sea-risks.

In a policy on a cargo from Philadelphia to St. Sebastian's, the insurers stipulated to take 'no risk in port but sea-risk.' The vessel was captured about four leagues from St. Sebastian's, and two leagues from the shore, and carried into Passage, whence she was taken by a pilot and French crew to Bayonne, where the cargo was put under sequestration, and landed by order of the French government, and stored in the public ware-

houses. It was contended on the part of the insurers that this was a loss by seizure in the port of Passage, and was accordingly within the exception. The court said, if the first 'taking possession of the vessel is to be deemed a capture, of which there can be no doubt, the subsequent proceedings against the cargo are immaterial, if she was never released from the capture. Admitting that the proceedings after her being carried into Passage are to be deemed a seizure in port, it will not discharge the underwriters.'⁽¹⁾

A provision that the insurers 'take no risk in port,' has been held to extend to all ports at which the vessel touches of necessity, as well as those in the regular course of the voyage.⁽²⁾

A ship and cargo were insured 'from St. Bartholomew's to Havana, free from loss if not permitted to entry on account of having negroes on board.' The vessel having some negroes on board came to anchor near the Moro Castle, at the entrance of the port of Havana, about three quarters of a mile from the place where vessels usually discharge goods, and at the place where vessels having slaves on board are required by law to stop until they are visited by the public officers and admitted to entry; and they are not permitted to come to the docks near the town until they have landed their slaves, which are landed at the place where this vessel came to anchor. Vessels are not considered to be in safety at the port of Havana until they are moored at the docks near the town. The vessel was wrecked before she had been visited by the public officers or landed her slaves, and accordingly before she was permitted to proceed to the inner part of the harbour. Mr. Justice Platt, giving the opinion of the court, said, 'I think the cause of loss intended to be excepted did not occur in this case. The terms *not permitted to entry* mean custom-house entry. The parties had in view the possibility that the entry of vessels with negroes on board might be interdicted. There was no such interdiction in this case.'⁽³⁾

In case of the insurers of the ship being 'exempted from all loss and damage by the ordinary dangers and perils of the seas,' the ship being wrecked; Chief Justice Parker, giving the opinion of the court, said, 'The plaintiff considers this loss as not happening by *ordinary perils*. We think that this suggestion cannot be supported. The risks in the policy were undoubtedly intended to be confined to captures, arrests, detentions, &c.'⁽⁴⁾

A cargo being insured, 'French risks excepted,' was captured by a French privateer and recaptured by a British frigate, and condemned at Jamaica as French property. Mr. Justice Radcliff gave the opinion of the court that, 'The terms of the exception must mean that the insurer is not to be liable for any loss by the acts of Frenchmen. It cannot be said that the subsequent capture was not a consequence of, or probably occasioned by the first. It is not material that it should appear to be so.'⁽⁵⁾ That is, to render the insurers liable it must satisfactorily appear that the excepted risk did not contribute to the loss. But this seems to be a pretty strict construction of the exception in respect to the assured.

(1) Duval v. Com. Ins. Co. 10 Johns. 278.

The exception of seizure in port extends to a port of necessity.

Free from loss if not permitted to entry on account of having slaves on board.

(2) Patrick v. Com. Ins. Co. 11 Johns. 9. See also Baring v. Veaux, 2 Camp. 541.

(3) Dickey v. Unit. Ins. Co. 11 Johns. 358.

Exception of the 'ordinary perils of the seas.'

(4) Law v. Goddard, 12 Mass. Rep. 112.

The insurers are not liable where it is doubtful whether the excepted risk did not contribute to the loss.

(5) Roget v. Thurston, 2 Johns. Cas. 248.

Exception of loss by the British, causes the acts of the British, while in possession of the property, to be at the risk of the assured.

(1) *Coolidge v. New York Fir. Ins. Co.*
14 Johns. 308.

Interruption of the voyage by blockade is within the exception of detention.

(2) *Wilson v. Unit. Ins. Co.*
14 Johns. 227.

Animals insured 'free from mortality.'

(3) *Lawrence v. Aberdeen,*
5 B. & A. 107.

(4) *Drinkwater v. Lond. Ass. Co.* 2
Wils. 363.

(5) *Langdale v. Mason,*
Marsh. Ins.
791.

A ship being insured from Boston to Cadiz 'free from loss by the British or Americans, but in case of capture by either, the usual sea-risks to continue,' was captured and taken into Gibraltar by the British, where the captors moored her in an exposed situation between other vessels, which run foul of her, so that when the captain regained possession, she was a mere wreck and not fit to repair. Mr. Justice Spencer, in giving the opinion of the court, said, 'If, after the capture, the vessel had been lost by a sea-risk, strictly speaking, undoubtedly the underwriters would have been answerable. But if the loss is attributable to an act of the captors, which if done by the assured would absolve the insurers from the loss, then the insurers would not be liable. The loss is attributable to the mooring the vessel in an exposed situation, and I think it cannot be doubted that had the vessel been thus moored by the assured, the insurers would not have been liable on account of negligence.'(1)

A cargo being insured from Norfolk to Cadiz 'free from British capture and detention,' the ship, which had a British license, was boarded in Hampton Roads from the British squadron then blockading the Chesapeake, and ordered back to Norfolk; and the voyage was in consequence given up. The court said, 'There is no difference between detention and restraint in this case. The ship was detained and restrained by the British from proceeding; being warranted free from such detention. The assured cannot recover.'(2)

Under a policy upon mules, asses, and oxen, 'free from mortality and jettison,' it was said that 'the word *mortality*, in its ordinary sense, never means violent death,' and accordingly the insurers were held liable for the loss of such of the animals as died in consequence of injuries received by the rolling of the ship during a storm. Chief Justice Gibbs said, 'Suppose a horse were by the motion of the vessel in a storm to have his legs broken, but arrive alive; the underwriters would be answerable for that loss.'(3)

In a policy on a building against fire, with the exception of losses occasioned 'by a usurped power,' a fire occasioned by a mob does not come under the exception.(4) But the exception of losses 'by civil commotion' comprehends losses by riots and mobs. Lord Mansfield said, 'I think a civil commotion is an insurrection of the people for general purposes, though it does not amount to a rebellion where there is a usurped power.'(5)

Section 17. *Risks in Bottomry Interest.*

The risks and losses to which the lender on bottomry or respondentia is liable, depend upon the particular stipulations of the bond. The lender cannot be bound to take the risk arising from a violation of law, and a stipulation of this kind is, at least, void itself and it makes void a contract of which it constitutes an essential part. The principles already stated in this respect

in relation to insurance,(1) apply to bottomry and respondentia (1) *Supr.* 29. bonds.

The forms of these bonds are different, some specifying the risks to be borne by the lender, and others providing in general that the bond is to become absolute on the arrival of the ship or goods.(a)

Forms of bottomry bonds different.

The risks understood to be assumed by the lender under the forms of bottomry and respondentia bonds in common use, are perils of the seas, captures, and all inevitable accidents. Cleirac says, the risks assumed by the lender are the same that are usually insured against in a policy of insurance.(b) Valin says, the lender assumes sea-risks including those of piracy and capture.(c) And this construction seems to be generally adopted.(d)

Risks assumed by the lender.

The lender, who is in effect the insurer, does not take the risk of loss by the conduct of the borrower,(e) or his agents;(f) and the French ordinances exonerate the lender from loss arising from the qualities or defects of the subject hypothecated.(g) But nothing prevents parties from expressly stipulating that these or other risks and losses shall be assumed by the lender.(h)

Loss by fault of the borrower or his agents.

The most important question concerning this contract relates to the effects of the perils, or kind of losses which fall upon the lender. By the ordinance of Hamburg he is not liable to contribute to general average.(i) In France the lender takes the risk of general average losses, unless the parties expressly stipulate otherwise.(k) And the law seems to be the same in Denmark.(l)

Whether the lender takes the risk of general average losses.

Lord Mansfield says, 'By the law of England there is neither average nor salvage upon a bottomry bond;(m) and so Lord Kenyon; 'By the law of England a lender upon respondentia is not liable to average losses; but is entitled to receive the whole sum advanced, provided ship and cargo arrive at the port of destination.'(n) Mr. Justice Kent said, upon the authority of these cases probably, 'The risk on a bottomry policy is peculiar; there is neither average nor salvage.'(o) But the parties sometimes stipulate expressly that the lender shall be liable to

(a) 1 Mag. 393, cas. 34; 3 Burr. 1394; 1 Bl. 396; 1 Beawes, 332. tit. Bottomry, &c.; Weskett, tit. Bottomry, n. 28; 2 Mag. 52. n. 132; ib. 56. No. 133; Park, 673; Marsh. 82; Abbott App. No. 1, 2, 3, & 4. (b) Le Guidon, c. 18. a. 2. n. And see D. lib. 22. t. 2. l. 1, 3, 4; Ord. Louis XIV. tit. Cont. à Grosse Avent. a. 11. Cod. de Com. l. 2. t. 9. n. 136; Roc. de nav. n. 51; Marsh. 62. c. 5; Appleton v. Crowningshield, 3 Mass. Rep. 443. (c) Tit. Cont. à Grosse. Avent. a. 11. n. (d) Barton v. Wolliford, Comb. 56; Joyce v. Williamson, Park, 627; Robertson v. Unit. Ins. Co. 2 Johns. Cas. 250. (e) Roc. de Nav. n. 51. Dig. de naut. scen. (f) Marsh. 756. b. 2. c. 5; Dig. lib. 22. t. 2. de naut. scen. l. 3; Wilmer v. The Smilax, 1 Peters's Adm. Rep. 295. n. (g) Ord. Louis XIV. tit. Cont. à Grosse. Avent. a. 12; Cod. de Com. l. 2. tit. 4. n. 137. See also Le Guidon, c. 5. a. 8. (h) 2 Emer. 510; Des Cont. à la Grosse, c. 7. s. 2. (i) tit. 9. a. 2; 2 Mag. 225. n. 931. (k) Le Guidon, c. 19. a. 5; Cod. de Com. l. 2. a. 9. n. 141. (l) Walpole v. Ewer, Park, 629. (m) Joyce v. Williamson, ut supra. (n) Walpole v. Ewer, ut supra. (o) 2 Johns. Cas. 252.

(1) *Weakett*,
art. bottomry,
n. 22, 27; 2
Mag. 52. n.
132.

The lender is
entitled to the
salvage.

(2) *Gibson v.*
Phil. Ins. Co.
1 Bin. 405.

Whether the
lender must
bear partial
losses.

(3) 1 Mag.
24. s. 24;
Appleton
v. Crowning-
shield, 3
Mass. Rep.
443; *Wilmer*
v. The Smit-
lax, *Peters's*
Adm. Rep.
295. n.; 2
Val. 12. tit.
des Cont. à
Grosse, a. 18;
Cod. de Com.
l. 2. tit. 9. n.
142.

(4) b. 2. c. 5.
(5) *Thomp-*
son v. Roy.
Ex. Ass. Co.
1 M. & S. 30.
(6) 1 Mag.
24. s. 24.

(7) *Rucker*
v. Conyng-
ham, *Peters's*
Adm. Rep.
295.

contribute to general average.(1) And it has been held that under this provision the lender contributes on the amount of the loan, not on the amount of the marine interest added to the loan.(2)

By saying there is no salvage in bottomry, Lord Mansfield may mean, that the lender is not liable to contribute to the expense of saving the property in case of shipwreck, &c. or he more probably means that there is no constructive total loss; for as to the part of the property saved, or the proceeds of it, there seems to be no doubt that it continues to be subject to the hypothecation,(3) it is universally so held in all cases and by all writers.

It seems to be implied in the English cases above cited, that the lender only takes the risk of a total loss. Mr. Marshall accordingly says,(4) 'Nothing short of a total loss will discharge the borrower.' The risk in this contract seems, therefore, to be considered the same that it is in a policy free from average, or against total loss only;(5) under which, as will appear subsequently, the insurer's liability is very much circumscribed, as he is exonerated from some losses which are considered total under a policy without this exception. But this doctrine is undoubtedly subject to some restrictions and limitations. If ninety per cent of the cargo, on which money is lent, is totally destroyed by the perils of the seas, and ten per cent arrives, the ten per cent belongs to the lender towards repaying the loan. But if what arrives is not equal in value to the amount of the loan, it has never been held by any judge, or intimated in any book, that the lender can in this case recover the deficiency from the borrower. That the lender could look only to the part of the cargo saved is every where taken for granted as a first principle in relation to this contract.(6)

But a distinction appears to be indistinctly implied by different judges and authors, between a bond of hypothecation given by the captain in a foreign port, and one given by the owners in the port of departure for the purpose of raising funds for his adventure. Peters, J. mentions, as one of the essential requisites in bottomry made by the master, that 'there must not be a personal responsibility.'(7) It seems to be admitted, or at least generally implied, that hypothecation by the captain to raise necessary supplies, only binds the property, unless he makes himself personally liable by deviation or misconduct. If this be the construction of such a bond, it does not appear how the lender can be discharged of average, whether general or particular, except in case of the value of the hypothecated property exceeding the amount of the loan by that of the average.

The borrower is then personally subject to average on hypothecated property to the entire exoneration of the lender, only in case of hypothecation by the owner; and not in this case, except where the average does not arise from the destruction of a part of the property, which reduces its value below the amount of the loan.

But it seems by what Lord Mansfield and Lord Kenyon said, whose opinion has been cited as law by Mr. Justice Kent,⁽¹⁾ that in case of hypothecation by the owner at least, the lender is entitled to the payment of the whole sum lent, in case of the ship or goods arriving, or being capable of arriving, in specie, however great an average loss, whether general or particular, it may have sustained. This doctrine is explicitly stated in the cases cited above, but upon what course of reasoning, or provision of the contract, or principle of law, it is founded, does not appear. Emerigon says, a general average ought to be paid by the lender, because it is incurred to save the property from total destruction, and consequently to save his loan.⁽²⁾ Mr. Marshall says, 'The nature and object of bottomry contracts seem, of themselves, to require that the lender shall be liable for general average.'⁽³⁾

(1) 2 Johns. Cas. 252.

(2) tom. 2. p. 505. Des Cont. à la Grosse, c. 7. s. 1.

(3) b. 2. c. 6.

Notwithstanding the antiquity and very general adoption of this contract, its construction is not perfectly settled upon fixed and well defined principles, either in Great Britain or the United States, unless some decisions or treatises have escaped my attention, or I have overlooked some important principles, or fallen into some mistake of the construction of those which I have consulted. If the preceding view of this subject is not essentially imperfect or erroneous, it appears to be of importance that the parties in hypothecation should stipulate expressly what risks the lender is to assume; and how far, and for what losses, he is to be liable.

By a contract of hypothecation the lender, it appears, is made an insurer against a part, at least, of the losses for which insurers are liable under the common form of the policy. It also appears that he may be insured on the interest which the contract gives him in the hypothecated property.

But it appears that the lender is not indemnified against the same losses that the owner of the property would be under a similar policy. A bottomried vessel, which was insured by the lender, had received damage which could not be repaired at an expense of less than 3200*l.* and when repaired her value would have been only 2000*l.* She was accordingly sold as not worth repairing. In an action upon a policy on the lender's interest, Lord Ellenborough said, 'The question was not whether such a loss had happened as in case of an insurance on the ship might have entitled the assured to abandon; but whether it was an utter loss within the true intent and meaning of a bottomry bond. In the latter case, as nothing short of an actual total loss will discharge the borrower, so nothing less will render the insurer liable. If the ship exists in specie in the hands of the owner, it will prevent an utter loss.'⁽⁴⁾

Losses against which the lender on bottomry is indemnified by a policy upon his interest.

(4) Thompson v. Roy. Ex. Ass. Co. 1 M. & S. 30.

The doctrine here assumed, is, that as far as the borrower remains liable to pay the loan, the insurer of the bottomry interest is exonerated. The reasons of this doctrine are not expressed. They may perhaps be derived from the English statute against reinsurance, since to make the insurer liable, while the borrower remained so, would be a guaranty of the borrower's

(1) *Supr.* 41.

solvency, and accordingly somewhat similar to a reinsurance. But a mortgagee has his claim subsisting against the mortgager, though the whole mortgaged property is lost, whereas the lender in hypothecation may, by the destruction of the property pledged, lose the sum loaned. The lender, therefore, being exposed to greater risks, has a more complete insurable interest than a mortgagee; and yet a mortgagee, as we have seen, has an insurable interest in the property,⁽¹⁾ and it does not appear by any case or *dictum*, that he may not be insured against the same risks and losses, in respect to which an absolute owner might be insured. Insurance by a mortgagee is again much more similar to reinsurance. It is not apparent why a lender in hypothecation has not an assurable interest to the amount of the loan, in regard to all the risks and losses against which a mortgagee may be insured.

CHAPTER XIV.

AMOUNT OF INSURABLE INTEREST.

Section 1. Valued Policies.

Necessity of
fixing the va-
lue of the
subject in-
sured.

INSURANCE being a contract of indemnity, the underwriters are not liable to pay any loss except such as the assured has actually sustained. Where the loss is occasioned by the injury or destruction of a part or the whole of the thing insured, the amount of it cannot be ascertained without determining the value of the subject. In a case of total loss the value of the property necessarily comes in question, for it must be ascertained whether the whole value be equal to the sum insured by the underwriter; since if it be less, the underwriter is obliged only to pay its value, though the amount insured by him is greater. If the sum of a thousand dollars is insured on goods of the value of 800 dollars, which are burnt, sunk, or captured, the underwriter is liable to pay but 800 dollars, this being the whole amount of the assured's loss; if the value of the subject is exactly equal to the sum insured, the whole amount insured is to be paid; if the sum insured is less than the value of the property, the assured stands underwriter for himself on the excess. If the sum of 800 dollars is insured on property worth 1000 dollars, then in any case of loss, whether partial or total, or particular, or general, the underwriter pays four fifths of it, and one fifth falls upon the assured himself, unless he has effected other insurance on this excess. It is therefore necessary to ascertain the value of the subject insured, for the purpose of determining

whether the underwriter is liable to pay the whole, or only a part, and what part, of a loss.

As certain rules are adopted in fixing the value of the property insured in cases of loss; the assured must have a regard to these rules in effecting insurance, to determine the amount to be insured, in order to give him, as nearly as possible, an indemnity for his loss. If he cause less than the true value to be insured, he is not indemnified in case of loss. If he insure more than the value, he loses a part of the premium; for where a premium is returned for short interest, the underwriter retains one half per cent on the excess insured. In cases of large premiums this is of less importance, but in short voyages and where the premium is at a very low rate, this sum retained by the underwriter makes a considerable proportion of it. And it is in all cases an absolute loss to the assured; though it is justly and fairly due to the underwriter for his trouble in making a contract, which he is ready to fulfil; but for which it is the assured's neglect or choice, not to supply a sufficient subject. The rules, therefore, by which the value of the property is ascertained, are important, as well in making insurance, as in settling losses.

In effecting insurance the assured must have regard to the rules by which the value of the interest is determined.

In some policies the value of the subject is agreed upon by the parties. A policy in this description is called a *valued* policy; if the subject is not estimated at any particular amount, or rate, in the contract, it is an *open* policy; the value in such case being open to inquiry and proof; whereas, in the case of a valued policy, the valuation, if made without any fraud, or illegal intention, is binding on the parties.

What are valued, and what are open policies.

The same policy may however be a valued and an open one; as where the ship is insured at a certain value, and the freight is insured in the same policy without a valuation; (1) or where a part only of the goods insured in the same policy are valued.

(1) *Riley v. Hartford Ins. Co.* 2 Conn. Rep. 368.

If the valuation be intended to cover an illegal purpose it will be void itself, at least, if it does not make the whole contract so, as appears from the general principles already stated in relation to illegal contracts. (2) We have seen that wager policies are prohibited by statute in Great Britain, (3) and that in Massachusetts wagering contracts in general are not considered as imposing any obligation on the parties. (4) Where a law exists, or a doctrine prevails to this effect, a valuation of goods for the purpose of evading it will not be sustained by courts, but is considered as absolutely void. It was even insisted by the counsel in one case that every valued policy was a wagering contract, under the statute above mentioned, but the court did not seem to regard this objection to valued policies in general as of much weight. Lord Mansfield said, however, 'If it should come out in proof, that a man had insured 2,000*l.* and had an interest on board to the value of a cable only, there never has been, and I believe there never will be, a determination, that by such an evasion the act of Parliament may be defeated. Where valued policies are used merely, as a cover to a wager, they would be considered as an evasion.' (5) Where wagering policies are

The effect of a valuation intended to cover a wager.

(2) *Supr.* 29.
(3) 19 *Geo.* II. c. 37.
(4) *Supr.* 2. n. 39.

(5) *Lewis v. Rucker*, 2 *Burr.* 1171.

prohibited by positive statutes, an over-valuing with the intention of both parties to violate the law would no doubt make the whole contract void; but where they are not so prohibited, but are held, as in Massachusetts, to impose no legal obligation, it does not appear that an over-valuing for the purpose, in both parties, of combining a wager with an insurance, would make the insurance void, and prevent its covering the interest actually at risk.

(1) *Haigh v. De La Cour*, 3 Camp. 318.

Fraudulent over-valuation.

(2) *Marshall v. Parker*, 2 Camp. 69. See 12 Mass. Rep. 75. where Mr. Marshall's statement of this doctrine is recognised as law. See also 1 Emer. 264. c. 9. s. 2. 3 Caines, 16.

(3) See the cases and authorities cited above, as to the effect of fraud. Also *Shawe v. Felton*, 2 East, 109; *Mar. Ins. Co. v. Hodgson*, 6 Cranch, 220; *McNair v. Coulter*, 4 Brown's P. C. 450; *Millar*, 255.

Marine ordinances forbid over-valuation.

A valuation fairly made, though high, is valid.

(4) *Weskett*, art. valuation, n. 7. art. double insurance, n. 2; 1 Emer. 264. c. 9. s. 2; Cod. de Com. l. 2. tit. 10. s. 1. a. 147.

If the goods have been fraudulently over-valued, the valuation is not binding. Where an over-valuation is fraudulently made, with the intention, on the part of the assured, of destroying the property, for the purpose of recovering of the insurers the amount at which it is valued, such a fraudulent purpose will make the whole contract void. Goods worth 1,400*l.* being valued at 5,000*l.* the ship was run away with, and the goods actually on board were disposed of by the supercargo. The loss was adjusted on the production by the assured of bills of lading, showing that they had shipped property to the amount of 5,000*l.* But it appeared that these bills of lading were fictitious, and the adjustment made upon the strength of them, was accordingly not binding. The assignees of the assured, who had become bankrupts, claimed for the 1,400*l.*; Sir J. Mansfield said, 'If the bankrupts intended from the beginning to cheat the underwriters, the assignees can recover nothing. The fraud entirely vitiates the contract.'(1)

It appears from other cases that a fraudulent valuation will be set aside,(2) and this is no more than the application to this agreement of a principle that is applicable to all contracts.

But if the valuation be neither intended as a cover for a wager, by both parties, nor fraudulently made by the assured, it is binding on the parties, in case it can be carried into effect; and will, as between them, determine the value of the property.(3) And the circumstance of the property being valued very high has not in itself been held to be a sufficient proof of a wager, or of a fraudulent intention on the part of the assured. The ordinances of some countries have prohibited the over-valuing of property insured, and either made the valuation void, on this account, or the whole contract.(4)

An over-valuation is said by Lord Mansfield to be contrary to the general policy of the marine law, and to the spirit of the act against gambling policies; a temptation to fraud, and a source of abuse.(a) But it sufficiently appears from numerous cases that if the parties, without intending to wager, fairly agree to estimate the property at a high rate, their agreement will be valid. The amount will not be inquired into in such case, says Mr. Justice Yeates, 'unless the valuation is grossly enormous.'(b) Some value must be proved, it is said,(c) since if no goods are at risk the policy never attaches. But it is uni-

(a) *Hamilton v. Mendes*, 2 Burr. 1198. (b) *Miner v. Tagert*, 3 Bin. 205. (c) *Marsh*. 97.

formly held that the valuation must be very excessive to raise any presumption against the contract on this account merely. Mr. Justice Cushing, giving the opinion of the court, in a case on a policy upon a vessel valued at 10,000 dollars, on which the sum of 8,000 dollars was insured, said, 'If it appeared that her actual worth were no more than 3,000 dollars, it would not necessarily avoid the contract, nor restrict the damages to that sum; for she may, notwithstanding, have fairly cost her owners the whole amount of the valuation.'⁽¹⁾

(1) *Hodgson v. Mar. Ins. Co.* 5 Cranch, 110. See also *Feise v. Aguilar*, 3 Taunt. 506.

It often happens that expenses or profits are accruing, or expected to accrue, on the property, which the assured wishes to cover, and for this purpose makes the valuation. Though the value at the commencement of the risk constitutes the amount of interest in an open policy, yet it is not necessary to suppose that the parties have this value in view in agreeing upon a valuation. A valuation of goods which would be very high at the beginning of the risk, may be very low in a subsequent period of it, when great additional expenses have been incurred, in the transportation of them, or their proceeds have become more valuable by trade. A high valuation, therefore, affords of itself, very slight grounds of presumption against the intention of the assured.

The value of a vessel is not so certain as that of goods, and cannot be so satisfactorily and exactly proved. Insurance on vessels is therefore commonly made by valued policies. For the same reason freight is usually valued, where the owner of the vessel is also owner of the cargo, and most frequently in other cases. If no part of the cargo is shipped by the owner of the vessel, the gross amount of freight is readily ascertained by the bills of lading; but where the whole, or a part of the cargo, belongs to the owners of the vessel, or to the charterers, who are owners *pro hac vice*, the same uncertainty and difficulty occurs in proving the value of freight, as in proving that of the vessel.

The ship is usually valued, and the freight is frequently so.

Goods are more frequently insured in open policies, since the value is easily proved by the invoices, or by showing the price current at the time. But if the goods are of a kind, the price current of which cannot be easily shown, or if the price has greatly changed, subsequently to the purchase of the goods, or if their value has been increased by transportation, insurance is often made upon them by a valued policy.

Goods are not so generally valued.

In the case of a valued policy it is sufficient for the assured to prove that, while the property insured was at risk under the policy, it was lost by the perils insured against. He needs not to prove the value. Whereas, in an open policy, he must not only prove that the property was exposed to the risks insured against, and that its loss was occasioned by them; but he must also prove the value of the property.⁽²⁾

The value need not be proved under a valued policy.

(2) *Feise v. Aguilar*, 3 Taunt. 506.

But a valuation only affects the parties to it, and the same property may be valued differently in different policies, and each valuation will be valid as respects the parties to the contract of which it is a part. A ship being valued in one policy

The same property may be differently

valued in different policies.

(1) *Bousfield v. Barnes*, 4 Camp. 228.

at 6,000*l.*, and another at 8,000*l.*, and 6,000*l.* being paid on the latter policy, the underwriters on the former contended that, as the assured had been paid the sum at which the ship was valued in the policy subscribed by them, he could claim nothing of them. Lord Ellenborough said, 'The valuation is only conclusive between the assured and the underwriters, without taking into consideration what had been transacted between the assured and third persons.'⁽¹⁾

(2) *Higginson v. Dall*, 13 Mass. Rep. 102, 103.

A case has occurred in Massachusetts on the same point. A vessel was insured at Calcutta, by a valued policy, under which an abandonment was made, and a total loss paid. The same vessel was insured in Boston in behalf of the same party in an open policy. The policy effected in Boston was prior in date. The assured demanded a loss of the Boston underwriters also; at the same time proving the value of the vessel to exceed the valuation in the Calcutta policy. Chief Justice Parker, giving the opinion of the court, said, 'The estimate of value made in the foreign policy, is not binding upon either of the parties to this. The underwriter must be held to pay in the proportion that his subscription bears to the value of the ship as proved.'⁽²⁾

The insurers in this policy were therefore liable to pay precisely the same amount, as if the policy made at Calcutta had been an open instead of a valued one. This rule is general, that the underwriters, whether in an open or valued policy, pay precisely as if all prior insurances had been made by open policies; and their liability cannot be affected by a valuation made in a subsequent policy.

Insurance of 40,000 dollars was made on coffee, 'valued at twenty-five cents per pound,' with the usual clause, that the insurers were to be answerable only to the amount not covered by previous policies; and an insurance had been previously effected in Europe by an open policy on the whole cargo, including coffee, pepper, sugar, and saffron wood, to the amount of 155,555 dollars. It was contended on the part of the underwriters, that as all the pepper, sugar, and saffron wood, and a part of the coffee, was covered by the previous insurance; taking the whole cargo at prime cost, they were answerable only for the risk on the quantity of coffee not covered by the first policy. That is to say, in ascertaining the loss under this valued policy, they were to estimate that part of the coffee covered by the prior policy, at prime cost, which being paid for by the previous underwriters was to be put out of the question, and then the underwriters in this policy were to pay for the excess according to the valuation. The assured contended, on the other hand, that in ascertaining what part of the coffee had been insured in the previous policy, the pepper, sugar, and saffron wood, were to be estimated at prime cost, but the coffee at twenty-five cents per pound, and that these underwriters were answerable for the amount of coffee not covered by this mode of calculation. The whole of the coffee must, they said, as between these parties, be estimated at twenty-five cents per pound. And the court was of this opinion. They said, 'The whole of the coffee is to be

culated at the valuation, because the parties have agreed on at valuation, in reference to *this policy*.⁽¹⁾

An open policy had been made on goatskins, to an amount out sufficient to cover the prime cost, and the assured then d a policy effected on the same skins valued at fifty cents piece. In settling the loss under this second policy the court dided that all the goatskins were to be estimated at fifty cents ch, and from the amount at that rate, was to be deducted the ount for which the first underwriters were liable; and the fference was the amount of insurable interest as between the rties to the second policy.⁽²⁾

Seven open policies being made on goods shipped in Russia; e assured then effected an eighth policy on the same goods, aluing the invoice ruble at forty cents; and then a ninth, va ing the ruble at forty-six cents. The court held that under e eighth and ninth policies the valuation extended to the whole the goods, from the amount of which, at the rate of valuation the policy, the sum previously insured was to be deducted, d the excess was the amount of insurable interest under each those policies.⁽³⁾

But it has been held in two cases that, where the real value exceeds the valuation, the amount of a previous policy is to be ducted from the real value. A vessel worth 15,000 dollars d valued in the policy at 12,000 dollars, had been bottomried r the captain at sea before the policy was effected. It was ld that the amount of the bottomry bond was to be deducted om the 15,000 dollars.⁽⁴⁾

Where the assured expects goods to be shipped, but does not ow the kind or the amount, the policy is sometimes made on ods 'to be thereafter declared and valued.' Under a policy this form the declaration of the value, to make it a valued licy, must be made by the assured before he has intelligence a loss.⁽⁵⁾

Under a policy in this form the clerk of the assured, by his der, wrote out and signed a specification of the interest with a luation, on a separate piece of paper, which he wafered to the licy; but it did not appear that this had been shown to the derwriters before the loss was known. Lord Ellenborough id, 'A declaration necessarily imports two parties, the person o makes it, and the person to whom it is made. How can l nsider an uncommunicated instrument a declaration? Had it en communicated to any person, or if it had been written on e policy, so that the party could not recede, perhaps that ld have been sufficient. I allow that a declaration of inte st is no contract, and does not require the assent of the un rwriters, but it must be communicated in such a manner that e assured cannot recede from it. Here there would have en no evidence that the instrument ever existed, if it had suit the assured to destroy it.' And he at first doubted whether e policy could attach at all for want of a declaration, but on nsideration, said, he had fully made up his mind that a policy this form 'gives the assured a power, by duly declaring and

(1) *Minturn v. Col. Ins. Co.* 10 Johns. 75.

(2) *Kane v. Com. Ins. Co.* 8 Johns. 176.

See also *M'Kim v. Phon. Ins. Co.* *Condy's Marsh.* 152. n.; *Wharton's Dig.* 339. h. t. n. 202.

(3) *Pleasants v. Mar. Ins. Co.* 8 Cranch, 55. See also *Murray v. Ins. Co. of Penn.* 1 Hall's Law Journ. 161. and Mr. Justice

Thompson's remarks upon that case, 8 Johns. 182.

(4) *Watson v. Ins. Co. of N. A.* *Wharton's Dig.* 341. h. t. 208. sup. 308. n. 1.

The value to be declared by the assured.

(5) *Craufurd v. Hunter*, 8 T. R. 15. n.

The declaration of value must be made to the insurer before a loss.

(1) *Harman v. Kingston*, 3 Camp. 150.

A mistake in declaring value may be corrected.

(2) *Robinson v. Touray*, 3 Camp. 158.

Whether an agreement to require no proof of interest, is a valuation.

(3) *Hemmenway v. Eaton*, 13 Mass. Rep. 111.

Valuation endorsed on the policy.

(4) *Harris v. Eagle Ins. Co.*, 5 Johns. 368.

The valuation is of the interest of the assured.

(5) *Feise v. Aguilar*, 3 Taunt. 506.

(6) *Post v. Phoen. Ins. Co.*, 10 Johns. 79.

In a policy on the voyage round; the valuation of the outward cargo is a valuation of the proceeds.

valuing, before the loss, to make it a valued policy; but if the assured do not so declare and value, it is then an open policy. (1)

A declaration being made under a policy in this form on goods by the Tweende Venner, and Neptunus, through mistake, the goods intended to be declared on, and valued, having been shipped by the America; Lord Ellenborough said, 'If this was without fraud, and without prejudice to the underwriters, I think it might be corrected without their assent. It is the same as if a verbal message had been sent by the porter who had misdelivered it.' (2)

Where the policy contained a provision that, 'in case of loss no proof of property should be required,' it was contended in behalf of the assured that this provision was an agreement that the assured was interested to the amount insured. Chief Justice Parker, in giving the opinion of the court, said, 'Policies held to be valued have become so by virtue of certain words, which may be considered as technical; and they are well understood by all who concern themselves with commerce. It would be dangerous to give any other form of words that meaning, where any doubt may exist as to the intention to give them that effect.' (3)

In a policy against fire the sum of 10,000 dollars was insured 'on merchandise and utensils specified on the back hereof.' The following endorsement was made on the policy, namely, '380 kegs of tobacco, worth 9,600 dollars.' The court said, 'this must be considered a valued policy so far as relates to the kegs of tobacco.' (4)

The valuation of the goods is construed to be a valuation of the plaintiff's interest in them. Insurance being made on goods 'valued at 19,000*l.* of which the assured owned four-ninths, it was contended that the valuation was intended for the entire property, and accordingly that the interest of the assured was valued at four-ninth parts of that sum. But Sir James Mansfield said, 'If the assured are interested, is not that sufficient? It has been held, again and again, that it is unnecessary to prove the amount of interest under a valued policy. We must take it that the value insured is the value of the assured's interest.' (5)

And so where the policy was on one fourth of the vessel, valued at 5,500 dollars, and one fourth of the cargo, valued at 10,000 dollars; it was held to be a valuation of one-fourth part of each at those respective sums, which made the amount insured in the policy. (6)

A question has occurred as to what shall be considered the proceeds of a cargo, and what shall be a valuation of the proceeds. The sum of 11,000 dollars was insured on '100 bales of cotton, valued at 94 dollars each, and 25 tons of logwood valued at 80 dollars per ton, at and from Portsmouth, in New Hampshire, to one or more ports in Europe, one or more times, for the purpose of disposing of the outward and procuring a return cargo; and at and from thence to the vessel's port of discharge in the United States;' with a memorandum that, 'the risk was to attach to the proceeds of the articles in the return

It was not disputed that this would be a valuation of the cargo purchased with the proceeds of the cotton and sold on an actual sale. But on the arrival of the vessel at port, the sale of these articles being dull, and the price of the outward cargo was left in the hands of the consignees, who provided and advanced a return cargo on the account and credit of the assured. The underwriters insisted that the return cargo was not the *proceeds* of the cotton and logwood, or if the valuation did not apply to it. Chief Justice Parker, giving the opinion of the court, said, 'In a liberal sense of the words of the memorandum, the return cargo was the proceeds of the outward, for without the latter the former would probably have been procured. The underwriter took the return cargo as any property that might be substituted for that which was carried out.' He said, the construction of the policy was the same as if the insurance had been on the cotton and logwood, valued as in the policy, and on the *proceeds of them*. 'Upon such a reading there could be no doubt that the valuation would apply as well to the proceeds, as to the merchandise specified.'

(1) But to admit of this construction, the return cargo must be certainly in such case to be equal to what would have been the amount of the actual sales of the outward cargo.

The insurance being from Jeremie, in the West Indies, to New Orleans on coffee, 'valued at two cents per pound;' a question was raised whether the French pound, in use at Jeremie, and in the invoice was made out, or the American pound, was intended in the policy; and the court held it to be the American pound.

(2) The valuation of goods is said to fix the *prime cost*, (3) but whatever this description is given of it, the meaning appears to be that it fixes the *amount of insurable interest*. Lawrence, J. says it is 'the practice of binding parties as to the *amount of insurable interest*.' (4) And it is generally mentioned by judges as having this effect. It certainly is not limited to determining what shall be considered the original price of the goods. For goods of great weight or bulk, in proportion to their value, purchased in an inland place, the transportation, storage, commissions of agents, export duties, and other expenses, when they are shipped, may amount to more than the price originally given. But it has never been pretended that these expenses are not included in a valuation, whether made in the case of all property insured, or at any particular rate, at so much per pound, bale, ruble, franc, &c. This is conformable to the common understanding of *prime cost*, if this be supposed to be the subject of valuation; for goods are said to be sold at *prime cost*, when the vender is only reimbursed the price he received and all his expenses.

When a valuation is made for the purpose of fixing the amount of insurable interest, and as the premium is always a part of the interest, it would seem to be the more obvious construction of a valuation to consider it as including the premium, unless a contrary appears from the manner of valuing, or from some

(1) *Haven v. Gray*, 12 Mass. Rep. 71.

(2) *Gracie v. Bowne*, 2 Caines, 30.

A valuation at a certain rate per pound, means the pound of the place where the policy is made.

In what sense a valuation is said to fix the prime cost.

(3) 2 Burr. 1167, 1171; 1 Johns. 433; 5 Johns. 368.
(4) 2 East, 115.

Whether a valuation includes the premium.

(1) *Ogden v. Col. Ins. Co.*
10 Johns.
273.

other part of the policy. If goods are valued at so much in the lump, the valuation is generally considered to include the premium. This appears to have been taken for granted by the parties and the court, in a case which occurred in New York ;(1) and so it seems to be generally understood by underwriters. Otherwise the assured might be surprised in finding himself liable for a part of partial losses, against which he might suppose himself to be fully insured.

(2) *Mayo v. Maine F. & M. Ins. Co.*
12 Mass. Rep.
259.

Where the owner of one third part of a vessel, the whole of which was valued in the policy at 18,000 dollars, procured insurance to the amount of 9,000 dollars, at a premium of forty-five per cent, it was contended by the insurers that the valuation included the premium, and accordingly that only the sum of 6,000 dollars could be recovered in a total loss ; though they admitted that the vessel was actually worth 18,000 dollars, and accordingly that the insurable interest of the assured amounted to about the sum insured in the policy. Chief Justice Parker, giving the opinion of the court, said, ' When it is not expressed that the value stipulated is exclusive or inclusive of premium, and a larger sum is insured than the actual value of the property, there seems to be a fair presumption that the surplus value is put to the account of premium.'(2) This was permitting the assured to go out of the contract, that is, to prove the actual value of the subject, in order to put a construction upon the valuation, and show that it was intended to apply to only a part of the insurable interest. It is probably owing to this decision that an entire valuation of the whole subject is considered by some persons as excluding the premium. This does not however seem to be a necessary inference from the decision, and in other places insurers consider such a valuation as generally including the premium. There is nothing in the above case inconsistent with such an opinion. The decision is, that the facts of the case showed that the premium was not intended to be included in the valuation.

A valuation at so much for the franc, is held not to include the premium.

(3) *Ogden v. Col. Ins. Co.*
10 Johns.
273.

(4) *Minturn v. Col. Ins. Co.*
10 Johns.
75.

And so it was held of a valuation at so much per pound.

Whether the valuation is opened in

Under a policy on goods, ' valued at eighteen francs, valued at four dollars and forty-four cents,' it was held that the insurable interest was to be computed by adding the premium to the cost, reckoning eighteen francs of the invoice price at four dollars and forty-four cents. The court said, ' This is undoubtedly an open policy. There is no valuation of the goods insured. It was an ascertainment merely of the value of francs, and by no means dispensed with the necessity of showing the value of the goods on board. It follows then that the insured had a right to add the premium of insurance as a part of his insurable interest.'(3)

Where coffee was valued at a certain rate per pound, both parties agreed in adding the premium to the valuation to make the amount of insurable interest ; and no question was made in regard to the correctness of this mode of computation.(4)

Though it would seem from the preceding cases that a valuation of the goods makes the case the same as if the goods had actually cost the amount at which they are valued, yet if we

are to understand as literally accurate, what has been said in a few instances, it is otherwise.

Lord Mansfield is cited as having said, 'an average loss opens the policy. I will give you the origin of this custom. It was in a case⁽¹⁾ where Lord C. J. Lee said, valuation at the sum insured is an estoppel in case of a total loss, but not so in an average loss only. In 1747, the same point came again before the court, and was so determined.'⁽²⁾

Upon the same point, Sewall, J. giving the opinion of the court in Massachusetts, says, 'In valued policies the value is understood to be settled without further proof only in the event of total loss, and not in the adjustment of a partial loss, whether general or particular.'⁽³⁾ Weskett⁽⁴⁾ supposes the case of a vessel worth 1,500*l.* and valued at 1,000*l.* on which a loss of 400*l.* accrues, and says, 'now this 400*l.* ought to be borne by the real value of 1,500*l.* making 26*l.* 13*s.* 4*d.* per cent, and not by 1,000*l.*, the nominal value, which would make 40 per cent; and yet it is certain that averages on ships undervalued, are very often paid by this latter and erroneous calculation; whereas, in case of average, whether on ship, goods, or freight, the policy ought to be opened if there be an undervaluation.'

Magens says, 'It is not sufficient to make a valuation in the lump, because it would only serve in a total loss; but to make a valuation of service, where goods are damaged or partly lost, the policy must express what particular goods they were, and their value by the piece, pound, yard, &c.'⁽⁵⁾ He accordingly supposes the only reason for opening the policy, in case of a partial loss, to be the impossibility of applying the valuation in adjusting such a loss. But it will appear in the sequel that a partial loss may be adjusted upon the basis of the valuation.

Insurance was made on sugars, valued at 30*l.* per hogshead, which was probably higher than the invoice price, as it was the price at which the assured limited his agent in the sales at Hamburg, the sugars having been insured from the West Indies to that place, and, consequently, all the freight, besides other expenses, had accumulated upon the invoice price. The sugars had been damaged by sea-water about seventeen per cent; and Lord Mansfield and the other judges decided, that the underwriters must pay seventeen per cent of the amount at which they were valued.⁽⁶⁾

Under a policy on goods, valued at 1,500*l.*, which cost the assured, including charges, 1,443*l.*; half of the goods were lost. The court decided that the underwriters should pay half of the sum at which they were valued, and no question was made, whether the policy was to be opened because it was a partial loss.⁽⁷⁾ Coffee was insured and valued at 3,000*l.*, the invoice price of which was 2,720*l.* A partial loss occurred, and neither the parties, nor the court, expressed any doubt that it must be settled according to the valuation.⁽⁸⁾

The freight of a vessel was insured from Hayti to Liverpool, 'valued at 6,500*l.*' The vessel was lost, when only fifty-five bales of cotton had been taken on board towards the cargo for

case of average.

(1) *Erasmus v. Banks*, Mich. 21. Geo. II. cited 2 East, 113.

(2) *Shawe v. Felton*, 2 East, 113.

(3) *Clark v. Unit. Mar. & F. Ins. Co.* 7 Mass. Rep. 370.

(4) *Valuation*, n. 10.

(5) Vol. 1. p. 35. s. 34.

The policy not opened in an average on sugars, valued at so much per hogshead.

(6) *Lewis v. Rucker*, 2 Burr. 1167.

(7) *Tunno v. Edwards*, 12 East, 488.

A partial loss on goods valued in the lump, adjusted according to the valuation.

(8) *Goldsmid v. Gillies*, 4 Taunt. 803.

A loss of a part of the freight insured.

red, adjusted
according to
the valuation.

(1) *Forbes v.*
Aspinwall,
13 East, 323.

The necessity
of going out
of the policy
to adjust a
partial loss,
does not show
that the val-
uation ought to
be opened.

the intended voyage. Lord Ellenborough said, if it had been an open policy, the assured could have recovered only for the loss of the freight of the fifty-five bales of cotton, that being the only part of the freight in which the insurable interest had accrued. 'The object of a valuation is to fix an estimate upon the subject insured, and to supersede the necessity of proving the actual value. If the freight of a part only of the goods to be carried be lost, the assured can only recover in respect of that loss, according to the proportion which that bears to the whole sum at which the entire freight was estimated in the valuation.'⁽¹⁾ And this was called *opening* the policy, by which was evidently meant, not setting aside the valuation, but ascertaining to what and in what manner it was to be applied.

Weskett's objection to this way of settling an average is founded on the supposition that the underwriters would thereby, in case of an undervaluation, be liable to pay partial losses out of proportion to the premium. But whenever the loss can be ascertained to be one quarter, half, or any other definite proportion of the property, the underwriters ought to pay that proportion of the amount at which it is valued. Weskett's reason seems, therefore, not to be so much in favour of opening the valuation, as of adhering to it. The parties have agreed to consider the insurable interest as of a certain value; upon that value the amount of premium is estimated; and consequently the amount of every loss, as far as it is practicable, ought to be determined with reference to this agreed value.

Weskett's position seems to be, merely, that in order to ascertain the amount of a partial loss, you must go out of the policy, whereas the amount of a total loss appears by the policy itself. In proving a partial loss you must prove what it amounts to, but if you prove a total loss, the policy, if it be a valued one, proves the amount. This is quite a different thing from treating the contract as an *open* policy. In ascertaining the amount of a partial loss, the policy affords greater or less facilities, according to the subject or subjects insured, and the manner in which they are valued. If the policy is on a hundred bales of cotton, valued at so much in gross, and ten of them are destroyed, or they are damaged, some more and some less, to one tenth part of the whole value, it is plain that the insurer ought to pay one tenth part of the sum at which they are valued; that is, supposing the whole sum at which they are valued, is insured, which we are supposing all along. I presume that nobody ever knew of a loss of this sort adjusted upon any other principle. And yet it may give the assured more than indemnity, or less; for the article may be valued at twenty per cent less than he gave for it, or at twenty per cent more than he could sell it for. But as between the parties he is precisely indemnified, for they have agreed what shall be considered an indemnity.

But suppose the subject to consist of a hundred bags of sugar, and as many bales of cotton; and the whole to be valued together at one sum; and a loss to happen as before, by the destruction of ten bales, or damage to the amount of ten per

cent, of the cotton. The same facts will not show the amount of the loss in this case, as in the former; showing a loss of ten per cent on the cotton, does not give the proportion of the insurable interest lost. To find this, it is necessary to show, further, what proportion of the interest consisted of cotton, and what of sugar. Now the going out of the policy to show this last fact, instead of finding it in the policy by a separate valuation of the different articles, is all that Weskett could have meant by opening the policy.

Nothing more than this can be supposed ever to have been deliberately intended by any court of law. Strictly to open a policy, or treat a *valued* as an *open* policy, whether in respect to a partial or total, or a general or particular loss; what is it, but to substitute another contract for that which the parties have made? Unintelligible, impracticable, or illegal stipulations, may be void, or may defeat a contract; but where the thing agreed on is intelligible and lawful, the only legal question, if any, seems to be, how far it is practicable to carry it into effect. In case of the total loss of a ship insured in a valued policy, the insurers contended that they were answerable for only the value at the time of the loss. Lord Kenyon said, 'If we were to enter into the calculations contended for, every valued policy would be opened.'⁽¹⁾ And the reason applies with equal force to a case of partial loss. Mr. Stevens is of opinion that a valuation ought not to be opened in adjusting a partial loss.⁽²⁾

(1) *Shawe v. Felton*, 2 East, 109.

(2) Part 2. a. 1. p. 168.

If a part of the cargo insured is valued, it is easy to ascertain what amount that is not valued, is covered, by deducting from the sum insured the amount of the part valued. If different subjects, as ship and cargo, are insured in the same policy, and separately valued, or if goods are valued at so much the piece, box, &c. the value of a part is fixed by the policy.⁽³⁾

(3) *Amory v. Rodgers*, Park, 164.

Suppose a cargo consisting of different articles, and the vessel and freight to be insured in one policy, and all valued together at one entire sum; and a loss to happen on either one species of goods, upon the ship or the freight; how can the loss be settled according to the valuation? or, in other words, how is the amount insured on each to be determined? for that being determined, the mode of adjusting the loss appears from the above instances. Such a case has occurred. A policy was made on ship, cargo, and freight, all valued in gross, at 5,000 dollars. It was contended in behalf of the underwriters that this policy was void for uncertainty, because without a specification of the sums respectively insured on ship, cargo, and freight, it could not be known whether the underwriters were liable for a partial loss, or how to apportion the loss. The case turned on another point, and no decision was made upon this, on which, however, the judges were divided in opinion.⁽⁴⁾

(4) *Stocker v. Harris*, 3 Mass. Rep. 415.

There can be no doubt that if ship, cargo, and freight, are insured in an open policy, the contract is valid, and not void for uncertainty, any more than if a cargo, consisting of different kinds of goods, is so insured. Insurances are often made in this manner, and no question was ever made respecting their vali-

dity. If then it could be ascertained, under an open policy on ship, freight, and cargo, how much is insured on each, as it undoubtedly can be, what difficulty is there in ascertaining the same thing, where any two, or all of them, are valued together. Suppose the whole amount of the insurable interest in ship, cargo, and freight, insured in an open policy, to consist of ten parts, of which the ship constitutes five, the freight one, and the cargo four; and suppose five to be insured in an open policy. It is an easy thing to divide the five, into parts having the same proportion to each other. In case of loss on freight, or damage to the ship, or goods; in settling the loss under an open policy, it is ascertained what per cent is lost on the insurable interest, and if the sum insured is a half or quarter of the amount of the interest, the underwriter pays fifty per cent; or twenty-five per cent of the loss. Under a valued policy he ought to pay the same per cent upon the *agreed* amount of the interest, that is, upon the valuation, as far as that amount is covered by the policy. The rate per cent of loss being ascertained in this way out of the policy, the loss as between the parties is ascertained by taking the same proportion of the sum insured upon the agreed value. If it be a case of undervaluation, the amount to be paid by the underwriter is the same, whether the loss is adjusted as under an open or a valued policy. So in case of an undervaluation the underwriter pays the same amount for a total loss that he would have paid under an open policy. But this does not result from setting aside the valuation, but from the manner of making it.

In all cases of valuation, whether of different subjects in gross, or each subject separately, or by particulars; whether of a part of the interest insured, or the whole; the professed, as well as real intention of the parties, is, as far as they go, to fix the amount of the insurable interest. It is the same as if the goods, ship, or freight, were proved under an open policy to be of the agreed value. It follows as a necessary consequence, that in settling all losses, the adjustment should be the same as if the goods had actually cost, or the ship or freight were actually worth, the sum at which they are valued. Stopping short of the direct consequences of this principle, or departing from it, is distorting the proportions and breaking up the symmetry of the system. An error of this sort is the less excusable, as it defeats the contract, and substitutes another for that which the parties made.

Net freight.

(1) tit. "Freight, n. 10.
(2) same tit. n. 1.
(3) The Petapoco Ins. Co. of Baltimore.

Policies are sometimes made upon *net* freight, and Weskett says, the London Assurance Company usually refused to insure this subject otherwise.(1) According to him,(2) *net freight* means the profit of the hire of the ship, after deducting port charges, wages, &c. The published rules of one insurance company(3) define it to mean two thirds of the gross freight. A policy on *net freight*, therefore, made by that company, might in consequence of the publication of this rule, be considered as limiting the amount of the insurable interest to two thirds of the gross amount of freight. It does not appear, however, that the

expression has obtained this meaning according to any general usage.

In a policy made in Philadelphia, about 1800, the freight is valued at two thirds of the gross amount; (1) the same proportion of the gross freight was also insured in a policy in New York, (2) and insurers in some other places have adopted a similar rule, which shows some uniformity of practice in fixing the amount to be insured upon this interest.

But freight, as well as other subjects, may be valued above even the gross amount. In one case, the court said, 'The parties agree that the freight shall be valued at a sum, which eventually proves to be three times the value of the carriage of the goods. But we do not perceive that the estimate was unfairly made;' and it was adjudged that the underwriters should pay a loss according to the valuation. (3)

If the freight of a whole cargo is insured in a valued policy, and only a part of a cargo is put on board, the underwriter is liable only to the extent of the freight of the goods put on board. Insurance being made on freight, at and from Hayti to Liverpool, 'valued at 6,500l.;' the vessel was lost, when only fifty-five bales of cotton were on board towards making up the cargo. The assured claimed the amount at which the freight was valued. But the court said, that the valuation was made of the freight of a full cargo; and as only a part of the interest valued had accrued, the assured could recover only a like proportion of the amount at which the whole was valued. (4)

It seems by this case, and it is apparent in itself, that a valuation does not preclude the inquiry, whether the whole interest valued has been at risk; whether the valuation is of goods, freight, or profits. Lord Ellenborough says, in the same case,

If the ship would carry five hundred tons, and in fixing the valuation, the assured should calculate his freight upon five hundred tons, but when he reaches the port of loading he can get on ten tons only upon freight, and sails upon the voyage insured with those ten tons only; is it to be allowed, if the ship be lost, and he thereby loses freight upon ten tons, he shall be entitled to the valuation which includes the freight upon five hundred tons? (5)

This case was cited in Massachusetts, in one under a policy on freight from Amsterdam to Philadelphia, valued at 3,000 dollars, where the freight actually at risk was 1,028 dollars. It was decided that the valuation could not be opened, and Mr. Justice Putnam gave as one reason, that 'It was not found that the ship did not take all the cargo which could have been procured at Amsterdam. In this it differs from the case of *Forbes v. Aspinwall*.' (6) But upon the principle stated in that case, it might have appeared that a full cargo was on board; for otherwise, under a valuation of freight, the insurers are made to assume the risk of not obtaining freight, as well as that of not earning it by reason of the perils insured against. Mr. Justice Swift says, the valuation has 'reference to all the goods intended to be carried;' (7) but according to the principle stated by

(1) *Jones v. Ins. Co. of N. America*, 4 Dall. 246.
(2) *Cheriot v. Barker*, 2 Johns. 346.

(3) *Coolidge v. Gloucester Mar. Ins. Co.* 15 Mass. Rep. 341.

The valuation of freight applies to the freight of a full cargo.

(4) *Forbes v. Aspinwall*, 13 East, 323; see *Montgomery v. Eglington*, 3 T. R. 362.

A valuation does not preclude the inquiry whether the whole interest valued is at risk.

(5) 13 East, 327.

(6) *Coolidge v. Gloucester Mar. Ins. Co.* 15 Mass. Rep. 341.

(7) *Riley v. Hartford Ins. Co.* 2 Conn. Rep. 368.

Lord Ellenborough, it applies to all that can be carried. There seems to be no obvious reason for valuing freight at any particular sum, except where the assured is owner of the cargo, unless it is valued below the amount known by the parties to be at risk. Such a valuation, where the amount of freight at risk is not known to the parties, may at least, unless it is very low, impose upon the insurers the risk of the rate of freight being so low, that a full cargo may not amount to the valuation. But to add to this risk that of not finding a cargo, seems to be departing very much from the usual purposes of this contract.

Freight valued at so much, 'carried or not carried.'

(1) *De Longuemere v. Phœn. Ins. Co.* 10 Johns. 127.

Valuation of the freight of a voyage, for which different freights are stipulated, for the passages of which the voyage consists.

(2) *Davy v. Hallett*, 3 Caines, 16.

But where the policy was on the freight, valued at the sum insured, 'carried or not carried,' and, at the time of a loss only a part of the interest had accrued, a part of the cargo only being on board; it was held in New York that the amount was fixed at the full valuation.(1) In other words, by this clause, *carried or not carried*, the insurers were understood to assume the risk of not procuring goods to be shipped, on which the freight was to be earned.

Suppose the voyage to have intermediate stages at which freight up to the time is earned, and becomes due, independently of the circumstance of the vessel's arriving at subsequent stages; and the freight of the whole voyage is valued in gross. Is this a valuation of the amount of all the freights, or of the amount of each severally? A case of this description has occurred in New York. Insurance was made on freight valued at 2,000 dollars, 'at and from Philadelphia to Omoa and Golfo Dolco, and at and from thence to Philadelphia.' The assured was owner of the ship and cargo. In the outward voyage the ship earned freight to the amount insured. A return cargo was taken on board, the freight of which would have amounted to the same sum. This freight was lost. The assured insisted that the outward and homeward freight were each valued by this policy at 2,000 dollars, the insurers said both freights were valued at that sum, and as half of the whole amount of freight for the voyage round, had been earned, it was a loss of only fifty per cent of the amount insured. It was held to be a valuation of each successive freight separately at the amount of the valuation.(2) It was contended that the valuation applied to the amount of freight at risk at one time; and the reasons for this construction seem to be very strong, since the assured would otherwise be obliged to pay a premium on double the amount that he could recover in a total loss, which would be altogether anomalous. And yet something may be said in favour of the construction contended for by the insurers, since if one entire freight is to be at risk, during the period for which the insurance is made, there is a chance of a greater *pro rata* freight, in nature of salvage, in case of total loss. For example, if one entire freight, outward and homeward, on an India voyage, is to be paid only on the delivery of the homeward cargo in the United States, and the whole freight is insured to the full amount; though a total loss might happen by the ship's being damaged and disabled from pursuing her homeward voyage fur-

ber than to one of the West India Islands, and an abandonment should be made; still the actual loss to the insurers would be only the expense of transporting the goods from the West Indies to the United States, by which they would be entitled, in the nature of salvage, to the whole freight; whereas, if half of the whole freight had been earned and paid on the delivery of the outward cargo in India, and insurance had been made to half of the amount of the two freights, that is, to the full amount of what would be at risk at any one time, and a total loss should happen as before supposed on the homeward voyage, the actual loss to be paid by the insurers would be the same as before; though they would, by paying for the transportation of the goods from the West Indies to the United States, entitle themselves only to the homeward freight in the nature of salvage. This would be a reason, therefore, for demanding a higher premium in the latter case.

Insurance on profits is usually made by a valuation. Mr. Justice Livingston, giving the opinion of the court in New York, said, 'Every insurance on profits must of necessity be considered a valued, and not an open policy. If it were otherwise, it would be next to impossible to prove their value. How are you to ascertain what is often imaginary, and must depend on so many contingencies?'(1)

The prevailing practice of agreeing to settle a loss, under a policy on profits, by the same rules, and at the same rate, as a loss on the goods, is conformable to this principle; for it admits that the ownership of the goods gives, of itself, an insurable interest in profits, independently of the circumstance that the goods would actually have afforded a profit at the port of destination. It is consistent with this practice to go still further, and admit that the amount insured on profits in a policy in an open form, is the value of the interest; for if a proof of the amount of interest is required in this case, as in an open policy on goods, it would be requiring the proof of a fact to show the amount of the interest, which if required at all, should be required to show the existence of the interest; for if the amount depends on what profit would be actually made at the port of destination, it seems to follow that if no profit would be made, there is no interest. And as the interest is admitted without this proof, so should be its amount. This is also conformable to what is universally understood of an insurance on profits, namely, that it is the same thing as the insurance of goods at a valuation above the prime cost. But the same question might arise here as in case of a policy upon freight, namely, whether all the goods, of which the profits were intended to be insured, had been put at risk.

But a different doctrine prevails in England. There it is held,(2) that the property in the goods does not necessarily give an insurable interest in profits; to constitute such an interest, it must be shown that there would have been a profit, had the goods arrived at the port of destination.(3) The interest being considered of a kind, the amount of which can be ascertained

Whether profits are impliedly valued at the amount insured.

(1) *Mumford v. Hallett*, 1 Johns. 439; *Riley v. Hartford Ins. Co.* 2 Conn. Rep. 368.

(2) *Supr.* 46.
(3) *Barclay v. Cousins*, 2 East, 544; *Hodgson v. Glover*, 6 East, 316. S. C. 3 Camp. 277.

(1) *Eyre v. Glover*, 16 East, 218.

and proved, the same proof is required of the amount of this interest, as of that in goods or a vessel.(1) In England, therefore, under a valued policy on profits, the assured must show that the whole of the goods were at risk, and that there would have been *some profit*; the valuation will then attach to it, and determine the amount as between the parties. But if the insurance be in the form of an open policy, the *amount of interest* must be proved, and a return of premium may be claimed for short interest, as in other cases. But according to the principle adopted by the court in New York, the assured on profits has only to prove an interest in the goods, which of itself gives an interest in profits, and that the whole of the goods, of which the profits were insured, were at risk; and the sum insured will determine the value of the interest between the parties, whether the policy be open or valued in its form.

In policies against fire the value of the property must be proved, unless it is expressly agreed upon.

An open policy in form on an indefinite interest in a life, is construed as a valued policy.

(2) Stat. 14 Geo. III. c. 48.

In case of insurance on merchandise, furniture, or buildings, against fire, the rules as to valuation are the same as in relation to a ship or cargo; if the policy is open in its form the value of the interest must be proved.

Insurance on lives is made without a valuation. If the interest is a debt due to the assured, or any interest that can be definitely ascertained, then the amount of it is determined, and a return of premium is made for over insurance, as in other cases.(2) But if the interest be of a kind, the amount of which cannot be ascertained, such as the support of the assured by the person whose life is insured, or the receipt of an annuity from him, or the expectation of some future pecuniary benefit from the continuance of his life; the sum insured fixes the value of the interest between the parties; that is, the policy, though open in its form, receives the same construction as if the interest had been expressly valued at the sum insured.

Section 2. *Open Policies.*

The amount of the insurable interest is the value of the property at the commencement of the risk.

If the value of the interest insured is not agreed upon in the policy, it must be proved by the assured before he can recover a loss, and certain rules are adopted in ascertaining its amount.

The greater number of insurances, and especially those on ships or cargoes, have relation to an interest, the value of which may change. It is accordingly necessary to fix on some period at which the value is to be estimated; and as this must be done by a general rule, the time fixed upon for this purpose can be no other than the commencement of the risk. No subsequent time can be taken, since the interest may cease directly after the commencement of the risk, by the destruction of the thing insured. The value of the interest is therefore to be estimated at the time of the commencement of the risk.(a)

(a) 2 East, 109, 116; 7 Mass. Rep. 365, 369; 9 Mass. Rep. 436; 7 Johns. 343; 13 Mass. Rep. 250; *Lewis v. Rucker*, 2 Burr. 1167; *Usher v. Noble*, 12 East, 639; *Snell v. Del. Ins. Co.* 4 Dall. 430; *Carson, v. Mar. Ins. Co.* Wharton's Dig. 340. h. t. n 205.

In all cases the premium paid for the insurance constitutes a part of the insurable interest,(1) which shows that the amount of insurable interest is not precisely the price current or marketable value. And since the assured pays a premium for insuring the part of his interest that consists of the premium given, it follows, that the shorter the duration of the successive risks, the less expensive is the insurance. But it is hazardous to divide the same continuous risk into different portions, as the assured may lose his indemnity between the underwriters successively on one portion and the other, where the cause of a loss exists during one portion of the risk, and the loss actually happens after the commencement of another portion.(2) The risk is therefore usually made to commence at times at which the condition and value of the property can be most satisfactorily proved.

The premium constitutes a part of the insurable interest.

(1) 1 Mag. 37. s. 37. Poth. h. t. n. 43.

(2) Supr. c. 13. s. 15.

The general principle, by which the amount of insurable interest is computed, is the same that runs through the whole subject of insurance, namely, that of indemnity. It is not intended by the contract of insurance to put the assured in the same situation, in case of a loss, that he would have been in, had the adventure terminated successfully. He must take the chances of his speculation on the state of the markets. The indemnity refers to the beginning of the risk upon the specific subject insured, and losses are adjusted upon the principle of replacing him, as nearly as may be, in the situation he was in at that time.

The indemnity proposed by insurance, is, to put the assured in the situation he was in when the risk began.

The amount of the insurable interest in the ship is accordingly its value at the commencement of the risk; the insurable value in an open policy being once determined, continues to be the same during the continuance of the risk. The ship becomes of less value by decay, and wear and tear, but as between the parties to the policy it continues to be of the same value, and the same amount will be recoverable in a total loss, at whatever period of the risk it may happen, as will more distinctly appear under the head of total losses.

The amount of insurable interest in the ship continues the same during the risk.

The ship, as a subject of insurance, includes the tackle, boat, provisions, and whatever is necessary to equip her for the voyage.(3) The guns, ammunition, &c. of an armed ship, constitute a part of its insurable value.(4) If a ship has been recently purchased, its cost with the addition of the premium is its value in the policy.(5)

(3) 1 Johns. 80.
(4) 2 Val. 55; 1 Emer. 277.
(5) Wesk. tit. Interest, n. 9.
(6) Fuller v. Staniforth, 11 East, 232; Hornecastle v. Stewart, 7 East, 400.

The amount of the insurable interest which a charterer has in a vessel, depends on the amount he is liable to pay in case of her being lost;(6) the insurance of his interest is in effect a reinsurance.

The substantial part of the insurable interest in goods is their cost to the assured. This is the most satisfactory proof of the value, in case they are purchased near the time when the risk commences upon them. Accordingly, if an open policy is made on successive passages from port to port, and upon shipments successively made at different ports, though the subsequent shipments are only the proceeds of the first, yet the insurable

Amount of interest in goods.

interest may be greater; for the invoice value of each shipment is the measure of the interest.

The invoice price usually constitutes the amount of insurable interest.

- (1) *Le Roy v. Unit. Ins. Co.* 7 Johns. 343.
 (2) *Carson v. Mar. Ins. Co.* Whart. Dig. 340. h. t. No. 205.
 (3) *Gahn v. Broome*, 1 Johns. Cas. 120. See Ord. Copenhagen, a. 3.
 (4) *Coffin v. Newbp. M. Ins. Co.* 9 Mass. Rep. 436.
 (5) tom. 1. p. 261.

Goods purchased in a foreign market by barter.

- (6) *Cod. de Com.* l. 2. t. 10. s. 1. a. 151. See also *Le Guid.* c. 15. a. 15. 1 Mag. 43. s. 41.
 (7) v. 1. p. 41. s. 40.

Goods invoiced in a foreign currency.

- (8) *Thelluson v. Bewick*, 1 Esp. 77.

The amount of insurable interest is most frequently called the invoice price. But stating a price in the invoice does not determine the amount of interest any further than as it is a proof of the actual cost. A quantity of hides insured was invoiced at twelve cents per pound, which sum they were worth, but they had cost but ten cents; the court said, 'generally speaking, the prime cost is the best rule by which to test the value;' and it was held that they should be estimated at ten cents. But the court said, 'the prime cost might not be a just rule where the goods had remained on hand a considerable length of time.'(1) In such case the market price may have greatly varied; and the market price at the commencement of the risk is the true amount of insurable interest.(2) The prime cost is not, therefore, conclusive proof of the value. Yet the court always leans in favour of the actual cost.(3)

Where the risk on cotton was to commence at the Isle of France, and it was invoiced at the value there, which was more than the cost to the assured, the court held that the interest was to be estimated according to the invoice.(4)

Emerigon says, the actual cost is the rule, though the goods have fallen since the purchase.(5)

If the goods are purchased by barter in a foreign port, with which there is no mode of estimating the rate of exchange, the French code provides that the amount of interest shall be the cost and charges of the goods given in barter.(6)

Magens says, goods sent from places where no exchange is current, ought to be estimated at no higher value than bullion, or the coin or specie, brought from thence, would produce after the payment of the premium for the risk of the voyage, freight, and other expenses of transportation.(7)

Goods shipped at Havre, and invoiced in French currency, were insured in England, when the French crown of three livres was at twenty-four pence, but it was reduced to seven pence by the falling of exchange on France, before a loss that took place was paid. The insurers were willing to pay the loss, estimating the invoice value of the French crown at its rate at the time of payment; the assured claimed to recover according to the value as the rate of exchange was at the time of effecting the policy. Lord Kenyon said, 'The insurers did not insure against the debasement of the coin. In case exchange had risen, the assured would have had the benefit of the rise, and in case of a fall should submit to the loss.'(8) This was in effect holding that the amount of the insurable interest was varying with the rate of exchange, not only while the risk continued, but also afterwards, until the loss was paid.

But according to the rule adopted by some underwriters, 'The insurers are not affected by the loss or gain of the assured in procuring his capital; and if his capital abroad costs more than the *par* of exchange, and he wishes to be made whole in case of loss, he should make a valuation.' This seems

to be the most convenient rule, and has been approved of, and acted upon, by eminent insurers, but I am not able to say how generally it has been adopted. The rule above cited, from Magens, supposes the rate of exchange to be taken into consideration, but this is fluctuating, and in some instances, difficult to be determined. Since there is a common measure of value applied in all commercial countries, it is much more convenient and certain to adopt this, and to estimate the invoice value at the *par* of exchange.

Besides the *price* paid for goods, the charges upon them are included in the amount of interest. These include labour, storage, expense of transportation, and commissions actually paid to agents and factors.(1) The commission which is paid to an agent for effecting insurance, and the rate of his commission for settling a loss, are included in estimating the amount of interest. Mr. Stevens says, that these are included at Lloyd's, only in cases where the commission is actually paid.(2) The rule is the same in the United States.(3)

If the goods have been transported either by land or sea, subsequently to the purchase of them by the assured, and previously to the commencement of the risk, the expense of such transportation is a part of the interest to be covered. But the freight, or other expense to be incurred on the goods during the risk, are not a part of the insurable interest.(4)

Experienced insurers are of opinion that freight advanced by the owner of the goods, and not to be recovered back in any event, constitutes a part of the insurable interest; and there seems to be no ground to make any question of this, since such an advance would be lost in case of the loss of the goods.

Whatever subject is insured, whether it be the ship, cargo, freight, or profits, as the premium, and the premium of the premium, are always included in estimating the amount of the insurable interest;(a) it follows that in case of a stipulation for a return of premium on a certain contingency, as for convoy or safe arrival, the whole premium is to be added in estimating the amount of interest; since the assured may be liable to pay the whole premium, or rather he may not be entitled to a return of any part of it.

Where the insurers reserve one or two per cent out of all losses, it is necessary to add the same proportion—that is, as 1 to 99, or 2 to 98—to the amount of the interest, if a full indemnity is intended, so that in a total loss the assured may receive back the capital put at risk. As no abatement is thus in fact made, the provision respecting it becomes useless, and it is accordingly said to have been struck out of the common form of

Besides the price paid, the charges upon the goods make a part of the insurable interest.

(1) Fontaine v. Col. Ins. Co. 9 Johns. 29.

(2) p. 161. See Usher v. Noble, 12 East, 639; also Weskett, art. Loss, n. 2.

Freight advanced, and not to be refunded in any event.

In case of conditional return of premium, the whole is included.

(3) Anon. 1 Johns. 312. Rules of the Petapasco Ins. Co. of Balt.

Abatement from losses.

(4) Gibson v. Phil. Ins. Co. 1 Bin. 414.

(a) If the sum of 200 dollars is to be insured at a premium of ten per cent, the amount to be insured in order fully to cover the sum put at risk, is ascertained by deducting the rate per cent from a hundred, and making the proportion, 90 : 100 :: 200 : 222 .22 &c. the sum to be insured.

(1) *Weskett*,
art. Loss, n. 2.
(2) *ib.* See
Molloy, b. 2.
c. 7. s. 6.
(3) 1 *Johns.*
82.

policies in England, about the year 1763.(1) *Weskett* supposes the reservation of this abatement to have been borrowed from the provisions of marine codes, prohibiting the insurance of property to its full value.(2) The court in New York considered it as having the effect of preventing the assured from fully covering the amount at risk.(3) But the general practice in the United States appears to be the same that *Weskett* describes it to have been in England, the rate per cent of the abatement is included in computing the amount of the interest.

The effect of
the abate-
ment is to
make the pre-
mium paid
higher than
the nominal
rate.

The practical effect of this provision is not then to prevent the assured from fully covering his interest. Its only effect is to make the premium more or less above the nominal rate. If the underwriters reserved an abatement of fifty per cent from losses, the assured would be obliged, in order to be fully indemnified, to effect a policy on double the amount really put at risk; or rather on double the amount of what the insurable interest would be, if no such abatement were made. Accordingly, a nominal premium of five per cent in such a policy, is in fact a premium of ten per cent on the real amount of his interest. The effect is the same in a less degree if an abatement of only one or two per cent is reserved. In comparing the rate of premium demanded by different companies, therefore, it is of importance to observe whether the abatement made from losses by both of them is the same.

Bounty on ex-
portation, and
drawback.

Weskett says, that in computing the interest in an open policy on goods exported, and entitled to a bounty on exportation, the bounty is to be deducted.(4) But it has been held in New York that the drawback, in case of goods entitled to debenture, is not to be deducted from the invoice. The court says, 'The drawback is intended for the benefit of the merchant, and although it may enter into the estimate of the value of the goods for exportation, it is no part of their actual price in the market here. To entitle the goods to drawback, they cannot be re-landed within the United States, and the shipper is obliged to give security that they shall not be re-landed. The drawback is therefore contingent, and in the case of re-landing by barratry, the assured would not only lose the amount of the drawback, but be exposed to inconvenience and additional loss on account of the security. To permit the drawback to reduce the value to be recovered, would, therefore, impose on the assured a burthen and a risk without an indemnity, a burthen by giving the security, and a risk in case of barratry.'(5) This opinion was subsequently confirmed.(6)

(5) 1 *Johns.*
Cas. 122;
Gahn v.
Broome, 1
Johns. Cas.
122.
(6) 1 *Johns.*
189; 10
Johns. 78.

Amount of
interest in
freight.

The insurable interest in freight is described by *Weskett* to be the net amount, after deducting the expenses that would have been necessarily incurred in earning it. But at present both in England, and most generally, at least, in the United States, the amount of the insurable interest in freight is the gross amount to be received according to the bills of lading or charter-party.(a) In general, therefore, the amount of insurable inte-

(a) *Stevens on Av.* p. 176. tit. Valuation, a. 3; *Stevens v. Col. Ins. Co.* 3 *Caines*, 43. Mr. Justice Washington considered the

rest on freight will depend on the contract between the owners and shippers, but where the same party owns ship and cargo, he may insure freight, the amount or value of which will be the price usually given between the same ports.

The amount of interest in freight, as in ship or goods, is the same for any part, or for the whole of a passage.⁽¹⁾ The assured must therefore, in order to cover his interest, insure the same amount for any part, that he would insure for the whole voyage from the port of loading to that of discharge.

The profit made on the outward voyage is an additional insurable interest on the goods, and may be insured in a new open policy on the homeward cargo, for it has now in fact become goods.⁽²⁾

If a policy on profits, without any express valuation, be an open policy, and not one in which the interest of the assured is implicitly valued at the amount insured; that is, if there be any open policy on profits, the only way of ascertaining the interest is by showing what profit would have been made, had no disaster happened from the perils in the policy. But if the rule adopted in New York be the true one, namely, that in a policy on profits, the profits are valued at the amount insured, by the act of making the policy; the only question will be, whether the whole of the goods were at risk, of which the profits were insured. If the sum of 1,000 dollars is insured on ten bales of merchandise, and this is considered to be in effect a valuation of the profits at that sum, and only five bales are put at risk, the sum insured will be one half of that named in the policy.

The amount of a consignee's insurable interest, distinct from that of his principal, is the amount for which he has a lien on the goods; resembling very much the interest of a mortgagee, or lender at respondentia.

In a policy on a life, if the interest be certain, as a debt, the amount may be ascertained in the usual way;⁽³⁾ but if it is an indefinite interest, as dependence for support, the policy, though open in form, would probably be considered a valued policy, in which the interest was valued at the sum insured.

In reinsurance the amount of interest is the sum insured in the original policy, with the addition of the premium of reinsurance, unless the original premium is to be deducted. Valin⁽⁴⁾ is of opinion that this deduction is to be made. Emerigon,⁽⁵⁾ on the contrary, thinks the original premium is not to be deducted in estimating the amount of interest for reinsurance. This mode of computing the interest makes the reassured a gainer by a total loss,

amount of interest to be the net freight. *M'Gregor v. Ins. Co. of Penn. Condry's Marsh.* 93. n. And in the same case evidence was given of a custom in Philadelphia to consider two thirds of the gross freight as the amount of insurable interest. *S. C. Wharton's Dig.* p. 338. h. t. n. 138. And it seems that the court was of opinion that the contract might under some circumstances be affected by such a custom.

(1) 15 East. 324.

The amount of interest in freight is the same for a part that it is for the whole voyage.

The amount of interest increased by profit.

In what way the amount of interest in profits is calculated.

(2) Val. h. t. a. 47; Emer. c. 9. s. 7; *M'Kim v. Phoen. Ins. Co. Condry's Marsh.* 152. n.

Amount of interest in commissions.

Amount of interest in a life.

Amount of interest in reinsurance.

(3) Statute 14 Geo. III. c. 48. s. 3; *Godsall v. Boldero*, 9 East, 72.

(4) tom. 2. p. 63. h. t. a. 20.

(5) tom. 2. p. 249. c. 8. s. 14.

(1) Supr. 42.
Amount of interest in bottomry.

(2) Supr. 43.
Williams v. Smith, 2 Caines, 1; 8. C. 2 Caines' Cas. 110.
(3) tit. 9. a. 2. 2 Mag. 225. No. 930.
(4) Cod. de Com. l. 2. t. 10. s. 1. No. 158.

Clause relating to prior insurance.

(5) Kemble v. Bowne, 1 Caines, 75.
(6) Col. Ins. Co. v. Lynch, 11 Johns. 233; Peters v. Del. Ins. Co. 5 Serg. & Rawle, 473; Warder v. Horton, 4 Bin. 539; Perkins v. N. E. Mar. Ins. Co. 12 Mass. Rep. 214.
(7) Davis v. Gildart, Park, 424; Rogers v. Davis, Park, 423; Craig v. Murgatroyd, 4 Yeates, 161; Casar. Disc. l. n. 91; Godin v. Lond. Ass. Co. 1 Burr. 489; Thurston v. Koch, 4 Dall. 348. and App. xxxii.

A policy made on a different day from its date. Two policies made at the same time.

to the amount of the premium on the original policy; which is inconsistent with the general principle, that the interest is to be so computed under an open policy, that in case of total loss the assured shall be exactly indemnified.

The lender in bottomry or respondentia, has an interest to the amount of the loan,⁽¹⁾ and the borrower may insure the excess of the value of the property over that amount.⁽²⁾ Or if the lender takes only a particular risk, the borrower has an insurable interest in the whole as to other risks. The ordinance of Hamburg allowed insurance by the lender, 'to the full amount of principal, interest, and premium.'⁽³⁾ The French law prohibits the insurance of the marine interest,⁽⁴⁾ upon the same principle probably on which it prohibits the insurance of freight and profits.

Section 3. Clause as to Prior Insurances.

American policies contain a provision that 'if the assured have made any other insurance upon the subject, prior in date, the underwriters shall be answerable only for so much as the amount of such prior insurance may be deficient towards covering the property.' Under this provision the amount of interest in respect to a subsequent policy against the same risks, is the excess of the value over the amount insured by the previous policies. But it is of importance to distinguish whether the policies are in favour of the same party and against the same risks;⁽⁶⁾ since making an insurance against one peril, with the clause as to prior policies, does not diminish the interest as to other perils; although the property is insured to its full value against capture only, the assured has still the same amount of interest to be insured against perils of the seas.

But if the subsequent policy contain no provision in respect to prior insurance, the amount of insurable interest for such policy will be the same as for the first, for the assured may insure again and again the same property against the same risks, if he will pay the premiums. But he can recover only one indemnity; this he may recover of the first or subsequent underwriters, and those who pay the loss may demand a proportionable contribution from the other insurers. The different underwriters are by this means made sureties for each other.⁽⁷⁾ This was one reason for introducing the clause respecting prior insurances.^(a) Another advantage resulting from this clause is, that it saves the assured from paying more than one premium for the same risk on the same insurable interest.

It has been held that in determining which is the prior insurance under this provision, it may be proved that a policy was subscribed by an underwriter on a different day from that of its date.^(b) It may also be proved which of two policies, made on the same day, was subscribed at an earlier hour. But if two

(a) 5 Serg. & Rawle, 475. (b) Lee v. Mass. F. & M. Ins. Co. 6 Mass. Rep. 208.

policies containing this clause are made at the same time in the day, so that it cannot be distinguished which was first subscribed, the construction of them is the same as if they did not contain this clause.(1)

Under this clause the amount of interest to which a subsequent policy applies, will depend on the amount insured in the previous policies, and also upon the valuation in the subsequent policy. A cargo valued in a prior policy at 12,000 dollars, the amount insured; was valued in a second policy at 27,500 dollars. Though the whole cargo was insured in the first policy, yet there remained an insurable interest of 15,500 dollars for the second, since as the property was valued in the second policy, this excess remained over the amount previously insured.(2)

Section 4. Increase and Diminution of the Interest.

The amount of the insurable interest is what the underwriters would be liable to pay in a total loss of the whole subject insured. If a part of the goods insured, or on which profits are insured, are entirely withdrawn from the perils insured against, and the risk upon such part has terminated, a total loss might take place upon the part of the subject at risk, and yet the amount of the insurable interest of the whole subject would not be recoverable.

In regard to goods it is a rule that if a specific part of the subject insured is withdrawn from the risks insured against, the interest is proportionably diminished. But this is not precisely the case in respect to the ship. The provisions and outfits constitute, as we have seen, a part of the insurable interest in the ship, but a specific part of this subject may be withdrawn from the perils insured against, by the consumption of the provisions, or by the wear and tear and decay of the sails, rigging, &c. and yet the amount of the insurable interest in the subject is not thereby diminished, as between the parties to the insurance.

In case of a partial loss by the destruction of some specific portion of the subject, if a total loss follow before the partial loss on the goods has been paid, or the damage of the ship has been repaired, this partial loss is merged in the total loss. This relates merely to the form of adjusting the loss; as the sum to be paid by the insurer is precisely the same, whether the claim is adjusted as two losses or one. Therefore if a specific part of the ship is withdrawn from the risks insured against by the operation of those risks, and not by wear and tear, decay, consumption of outfits, &c. the amount of insurable interest is thereby diminished, as long as the damage remains unrepaired.

In the case of whaling voyages the outfits constitute a very considerable part of the insurable interest. In these voyages the outfits are considered to *work into cargo*; that is, a certain proportion of the cargo is considered as being substituted for the outfits consumed. In these, as in other voyages, the consumption of outfits is not considered as diminishing the amount of insu-

(1) *Potter v. Mar. Ins. Co. C. C. U. S. Rhode Island, June, 1822. 2 Mason's Rep. 44.*

The amount to be covered in a subsequent policy depends upon the value in that policy.

(2) *M'Kim v. Phœn. Ins. Co. Condry's Marsh. 152. n. See also Bousfield v. Barnes, 4 Camp. 228; Higginson v. Dall, 13 Mass. Rep. 102; Minturn v. Col. Ins. Co. 10 Johns. 75; Kane v. Com. Ins. Co. 8 Johns. 176; Pleasants v. Mar. Ins. Co. 8 Cranch, 55.*

Consumption of provisions, &c. does not diminish the amount of interest.

The interest in the ship is diminished while damage remains unrepaired.

In whaling voyages a part of the cargo is substituted for outfits consumed.

rable interest, but they are distinguished from other voyages in this respect, that a part of the cargo, when any is obtained, is substituted for the part of the outfits consumed.

Whether a new investment to the amount of an average loss is at the risk of the insurers or assured.

In some instances the amount of a loss is a new investment. Where the damage of the ship has been repaired, or expenses have been incurred on account of the ship, cargo, and freight, or either, this is an addition to the amount of capital at risk. This raises the question whether the new investment is at the risk of the insurers or the assured. If a specific part of the goods is destroyed, it is paid for by the insurer, and the interest is thereby diminished, as between the parties, to that amount. And it does not appear by any decided case, nor is it intimated by any writer, that if the assured has on board an amount of goods equal in value to the sum insured, after a destruction of a specific part of the goods insured, and the payment of a partial loss on that account, or, which is the same thing in effect, a liability for such loss; or if he ship other goods equal in value to those lost; that the insurer is subsequently liable for the whole sum insured. On the contrary it may be safely assumed, that by the payment of a partial loss of this description the underwriter is discharged of his liability to that amount; since upon a different principle he might be liable to two or more total losses under the same risk, which cannot be supposed. In respect to goods then, the contract of the insurer is not that he will indemnify the assured against all the losses accruing from the perils specified, upon the amount insured kept at risk during the period for which the contract is made. The contract is to make indemnity for the losses that would happen to specific goods to the amount insured, put at risk within the terms of the policy, and kept at risk during the period for which the insurance is made, or until they should be lost. The contract may contain provisions requiring a different construction, as where it is agreed to insure a certain amount for a long time; but it cannot be doubted that this is the construction to be put upon a policy upon goods made in the usual manner.

New investment by repairs.

The same question occurs in respect to the ship. Suppose a specific part of the ship to be destroyed, and to be replaced at the expense of the insurers; is the insurable interest diminished by this amount as between the parties? or are the insurers liable for the amount originally insured in a subsequent total loss? In case of the payment of an average of 100*l.* for repairs, under a policy from London to Lisbon, in which the sum of 980*l.* is insured on a ship, that is afterwards totally lost during the risk, Magens says, 'If the assured has charged the insurer in the account of the 100*l.* average, with a proportionable premium, then he is only liable to the payment of 880*l.*; but otherwise he is answerable as well for the repairs of the ship, as for her safety till she arrives at Lisbon in a condition to be worth 980*l.*; consequently he ought to pay that full sum if she be lost on her said voyage to Lisbon.' He is of opinion, accordingly, that if, in adjusting the average, the assured receives of the underwriters a premium for taking the risk of the new investment, the

amount of it is to be deducted in adjusting a subsequent total loss. This implies that in the absence of any particular agreement or understanding, the insurers would still continue to be liable on the same amount subsequently to the payment of the partial loss. But the same writer intimates a doubt upon this subject, and seems to be rather inclined to the opinion that the assured ought to effect insurance on the new investment, and if he neglects to do this, the amount of the particular average should be deducted, that is, the assured should recover only for one entire total loss of the amount insured.⁽¹⁾

(1) vol. 1.
p. 158. cas.
viii. No. R. S.
T. U. W.

Lord Ellenborough, giving the opinion of the court, said, 'There may be cases in which, though a prior damage be followed by a total loss, the assured may nevertheless have claims in respect to such prior loss. Actual disbursements for repairs prior to a total loss are of this description, unless they are more properly covered by the authority of suing, labouring, &c.'⁽²⁾

(2) *Livie v. Janson*, 12 East, 648.

A ship insured from Jersey to Norway sustained sea-damage on the voyage, to the amount of more than twelve per cent, and, after this damage was repaired, was captured. On the question whether both losses could be recovered, Sir James Mansfield, giving the opinion of the court, said, 'This policy of insurance is a very strange instrument, as we all know and feel. In practice I know of cases in the King's Bench, where such expenses have been recovered as an average loss, without making any distinction whether it was recoverable as an average loss from damage repaired, or within the permission to sue, labour, travail, &c. and as no such distinction has been made, we find it safer to adhere to the practice which has obtained, and to call it all average loss.'⁽³⁾

(3) *Le Che-minant v. Pearson*, and same v. Allnutt, 4 Taunt. 367.

There is no doubt that the underwriter may in some cases be liable to pay in losses an amount exceeding that of the insurable interest. Mr. Justice Story intimates that the insurers may be liable for the expense of repairs exceeding the amount insured. He says, 'The assured may in all cases elect to repair the damage at the expense of the underwriter, and if he acts *bona fide* and with reasonable discretion, there is no decision yet pronounced, which declares he shall not be entitled to a full compensation, however great it may be, even though it should equal or exceed the original value of the ship.'⁽⁴⁾ But no case of this description has occurred, and the circumstances must doubtless be very remarkable to justify repairing the damage of a ship, at an expense exceeding her value at the commencement of the voyage. One reason for repairing a ship in a foreign port, at an extraordinary expense, is the necessity of doing so for the purpose of earning a great amount of freight pending at the time. Magens is of opinion that the insurers of freight, or the owners, if it is not insured, ought, in such case, to pay a part of the expense of the repairs.⁽⁵⁾ He is speaking of the case of a vessel repaired at Jamaica, where repairs are more expensive than in England, and he thinks the freight should pay the excess of the expense of repairs.

Whether an average loss for repairs may exceed the amount of a total loss.

(4) *Peele v. Merch. Ins. Co. C. C. U. S. Mass. Oct. 1822*, 2 Mason.*

(5) vol. 1.
p. 255. cas.
xx. No. N.

General average in addition to a total loss.

(1) *M'Bride v. Mar. Ins. Co.* 7 Johns. 431; *Jumel v. Mar. Ins. Co.* 7 Johns. 412; *Barker v. Phœn. Ins. Co.* 8 Johns. 237.

But the cases in which the amount of losses under a policy unquestionably may exceed the amount of the interest, and which often do exceed that amount, are those of total loss, preceded or accompanied by a general average loss, or by expenses which come under the agreement of the insurers to pay the expense of labouring, &c. for the safety of the property. If a ship puts into port to repair, and is afterwards totally lost in the course of the voyage, or if the property insured is captured, and expenses are unsuccessfully incurred to obtain its release, the underwriters are no doubt liable to indemnify the assured on the amount underwritten, for his proportion of the expenses of putting into port or of claiming the captured property.⁽¹⁾

CHAPTER XV.

GENERAL AVERAGE.

Section 1. *What distinguishes General from other Losses.*

Losses are general or particular, partial or total. Expenses incurred, sacrifices made, or damage sustained, for the common benefit of ship, freight, and cargo, constitute *general or gross average*. A loss which is not incurred for the general benefit is a *particular average or total loss*.^(a)

By a total loss is understood one on account of which the assured is entitled to recover the whole value of the subject, as between the parties, as far as that value is insured in the policy.

A partial, is not distinguished from a total loss by its amount merely, since it has in some instances been said by judges, that the sum to be paid in such a loss may exceed the value at which the subject is insured. In a total loss the amount recovered is a compensation for the subject itself, as far as it is insured; in

(a) Certain small charges, which were formerly assessed, in part, upon the cargo, such as pilotage, towage, port charges, &c. are called *petty average*, in distinction from gross average. *Le Guidon*, c. 5. a. 13; 2 *Weyt. de Av.* s. 4; *Cunningh. L. Dic. tit. Av.*; *Wesket*, art. *Petty Average*. These charges at length came to be compounded for at a certain per cent on the freight, and bills of lading in use at present, contain a provision for the payment of *primage and average accustomed*, which is a certain per cent on the amount of freight on some voyages; while on others no such allowance is made. None of these charges concern the insurer, except when they come under general average, or the clause in the policy authorizing the assured to sue, labour, &c. for the safety of the property.

a partial loss the amount recovered is a compensation for the damage to the subject, or a reimbursement of expense incurred on account of it.

If one person at the express or implied request of another, or with any authority for so doing, renders such other a service, by bestowing his labour or incurring expense on his account, he is entitled to a compensation for his services, and a reimbursement of his expenses. In some instances the circumstances in which property is placed, give any one authority to take charge of, and save it, as where it has been lost, or is in imminent danger of being so. Under such circumstances any one may render services, without any express request from the owner, the occasion giving him an authority, and being equivalent to such a request; and he will be entitled to compensation as far as any such request can be implied. Accordingly the finder or salvor, in such cases, has a lien on the property for a reasonable compensation, or a contract arises between him and the owner, by which the latter becomes obligated to remunerate him as far as the property is sufficient for this purpose.

Principles on which average contribution depends.

General average contributions are founded upon the same principle. Where expenses are incurred, or sacrifices made, on account of ship, freight, and cargo, by the owner of either, the owners of the others are bound to make contribution in the proportion of the value of the several interests.

But a loss, though it be extraordinary, and not a part of the expense and inconvenience of navigating the vessel, if it take place without the agency of the master, or crew, or other persons acting for the general benefit, is not a subject of general contribution; which must be an expense incurred, or sacrifice made voluntarily and with deliberate intent. The circumstances of deliberate purpose and a view to the common safety, distinguish general from particular average.

Characteristics in general average losses.

The occasions for general contribution, and the principles upon which it is made are the same, whether the property is insured or not. The underwriters are only liable to pay the assured the proportion of the contribution, assessed upon the amount insured, when the loss is occasioned by some of the perils insured against. But as general average losses usually arise from the perils insured against in the common form of the policy, underwriters are usually liable to reimburse to the assured the part of the average contributed by the amount insured in the policy. The principles of general average therefore become an essential part of the law of insurance.

Contributions in general average are made though the property is not insured.

Section 2. Jettisons and Sacrifices of a part of the Interest at Risk.

When it becomes necessary for the general safety to lighten the ship by making a jettison, or throwing overboard a part of the cargo, or of the provisions, tackle, or furniture of the ship,

Jettison.

the loss must be made good by contribution out of what is saved of ship, cargo, and freight.^(a)

Whether the crew is to be consulted as to making jettison.

(1) 1 Emer. 605. c. 12. s. 40.

(2) *Birkley v. Presgrave*, 1 East, 220. Sec 2 Bin. 565.

For what description of sacrifices contribution may be claimed.

(3) *Le Guidon*, c. 5. a. 21. *Laws of Oleron*, a. 9. *Cod. de Com.* l. 2. t. 11. a. 211.

Goods carried on deck.

(4) *Ord. Louis XIV.* tit. Jet. a. 13. *Cod. de Com.* a. 232; *Abbott on Shipping*, 344; *Lenox v. Unit. Ins. Co.* 3 Johns. Cas. 178; *Smith v. Wright*, 1 Caines, 43. (5) tom. 2. p. 205. And see 1 Emer. 140.

Most of the codes of sea-laws require the master to consult the officers and crew before making a jettison. But it is often impracticable, since jettisons are most frequently made in time of danger and hurry. Targa says, that during the sixty years while he had been a magistrate of the admiralty court in Genoa, he knew of but five jettisons regularly made, and those were suspected to be fraudulent on this account.⁽¹⁾

Where the occasion admits of it, the master will naturally consult his officers and men, but to subject him to their opinion is so far taking the government of the ship out of his hands. Lord Kenyon says, 'The rule of consulting the crew is rather founded in prudence, in order to avoid dispute, than in necessity.'⁽²⁾ Chief Justice Tilghman plainly intimates an opinion that a consultation is not necessary.^(b)

The right to claim contribution depends upon the kind of sacrifice made, and the occasion of making it. When a part of the cargo is thrown overboard there is no doubt of its being a kind of sacrifice for which contribution may be claimed. But if the owner of the vessel is the party claiming contribution, he is entitled to remuneration only for extraordinary expenses and sacrifices, and such as constitute a loss under a policy of insurance upon the principles which have been stated in a preceding chapter; since the ordinary expenses of navigating the vessel must be borne by the owner, as the means of earning freight.

If a mast be cut away, or a cable cut, or slipped, or if guns, or a boat, or a part of the ammunition or provisions are thrown overboard, these are doubtless such losses and sacrifices as, in general, give the owner a right to demand a contribution, if the occasion on which the loss is incurred, and the circumstances under which the sacrifice is made, are such as to authorize the claim.⁽³⁾

But the right to demand contribution may depend upon the particular situation of the thing sacrificed. If goods carried on deck are thrown over, it is held, in general, that no contribution can be claimed.⁽⁴⁾ The reason given by Valin, is, that goods so carried embarrass the navigation of the ship. But he thinks that this doctrine ought to be controlled by the usage of the trade, and accordingly that contribution may be claimed for goods thrown overboard from the deck of small coasting vessels, or river craft, which usually carry a part of their cargoes on deck.⁽⁵⁾

(a) *Lege Rhodia cavetur, ut, si levandæ navis gratia jactus mercium factus est, omnium contributione sarciatur, quod pro omnibus datum est.* Dig. 14. 2. 1.

(b) *Sims v. Garney, & al.* 4 Bin. 524. The law of the United States, July 20, A. D. 1790, c. 56. s. 3. requires the assent of the mate or second officer, and a majority of the crew, to putting back after the voyage is commenced, on account of the unseaworthiness of the vessel.

Upon the principle of this exception, if it is the usage of the trade to carry a part of the cargo on deck, a jettison of it ought to be a subject of general contribution. It is accordingly the practice in respect to whaling voyages to adjust, upon the principles of general average, the loss of oil thrown overboard from the deck, where it is carried for a short time after being put into casks, before it can be properly and safely stowed in the hold. It is usual to carry on deck a part of the cargo of a vessel loaded with lumber, but it does not appear to be the practice to contribute for this part of the cargo, if it is thrown overboard.

The distinction in respect to the loss of a boat, carried on deck, or on the sides, or at the stern of the vessel, which has

before been noticed,(1) is made in cases of jettison, as well as in particular average; many persons being of opinion that a boat cut away from the sides or stern is not to be contributed for; while others consider it a proper subject of contribution. The right to claim contribution in such case evidently depends upon the usage to carry the boat in this situation, and also upon its security, when so carried. The loss of a boat cut away from the stern davits was considered to be a subject of general average in New York.(2) If it be necessary to carry the boat in this manner for the safety of the ship or crew, there seems to be no reason why the cutting it away should not be the occasion of a contribution.(3)

Where a vessel is thrown over upon her side and the mast is cut away to make her *right*, this is a subject of contribution.

It is provided by some ordinances, and some writers are of opinion, that cutting away a mast that is sprung, or cutting the rigging, which hangs over the sides, for the purpose of disengaging the vessel from the rigging, or from a broken mast or spar, is a subject of general contribution, according to the value of the mast or rigging in its situation at the time of being cut away.(4) Mr. Stevens says, 'the situation in which these articles are placed, renders them of no value.'(5) But if this be the only reason why they are not to be contributed for, it is conceding that they are subjects of contribution under these circumstances, provided they are of any value in the situation supposed, and their value, in their situation at the time of their being sacrificed, is all that has ever been considered a subject of contribution. How does it appear that they are of no value in this situation? It must depend upon the particular circumstances. If they would be of any value to the owner; in case of the sea being smooth, and the weather favourable, so that he might make the most of them, he ought to be compensated for this value, since this is what he sacrifices on account of impending peril and for the general safety.

A case very similar to the preceding, is that of cutting or slipping a cable when the anchor is fixed in a *foul* or rocky bottom. If the cable is cut in such case, merely that the vessel may proceed on her voyage, it is a particular loss, to be sustained by the owner or paid by his underwriters,(6) since no agency of the master and crew intervened in causing the loss,

Boats.

(1) Supr. 255.

(2) *Lenox v. Unit. Ins. Co.*
3 Johns. Cas. 178.

(3) 1 Emer. 624. c. 12. s. 41.

A mast cut away to make the vessel *right*.

Cutting away a mast that is sprung, or rigging that hangs over the sides.

(4) Ord. Koningsb. a. 25; Ord. Copenhagen. a. 1. s. 10; 1 Emer. 622. c. 12. s. 41.

(5) Part. 1. c. 1. s. 1. a. 5.

Case of the anchor being fixed in rocky bottom.

(6) Supr. 256.

which had, in fact, taken place before the cable was cut. But if the cable is cut for the purpose of avoiding impending peril, the question then occurs, whether, under favourable circumstances, the property sacrificed might have been saved, that is, whether, in favourable weather, and without any impending danger, and by the use of all the means afforded by the place at which the vessel lay, there would have been any probability, and how great, of recovering the anchor. A vessel lying in Funchal Roads was driven in a gale, and dragged her anchor nearly a mile, until she *brought up* at a short distance from a rocky shore. After the gale had abated in some degree, but while it still continued with very considerable violence, the sea at the same time setting towards the shore, the master attempted to raise the anchor for the purpose of removing to a more safe anchoring ground. It was however found to be impracticable to raise it, and to avoid the danger of the situation,—since in case of the anchor's dragging, or the cable's parting, the vessel would have gone upon the rocks,—the master cut his cable. The loss of the cable and anchor was considered to be the subject of contribution; and the whole value was allowed, because it was thought possible that in favourable weather, when the vessel could without any immediate danger have remained in her situation, the anchor might have been recovered.

(1) Cod. de Com. l. 3. t. 13. n. 233. 237; Casar. disc. 46. n. 13. 57; Q. Weyt. de Av. s. 10; Molloy, l. 2. c. 6. s. 8; 1 Mag. 64. s. 54.

Damage incidental to jettison.

Excepting the cases in which the situation of the part of the ship or cargo sacrificed exonerates the parties concerned from contribution, it is a universal rule, constituting a part of every code of laws, and which has been acknowledged and acted upon from time immemorial, that if a part of the ship or cargo is voluntarily sacrificed to save the remainder from some impending peril, the owners of what is saved must contribute for the loss.

All the damage incidentally done to the ship or cargo in making a jettison, constitutes a part of the amount to be made good in general average.(1)

Where in cutting away the mast it splintered below the partners, and made an opening by which water was let into the hold, in consequence of which the cargo, consisting of corn, was damaged, this damage was considered a subject of contribution.(2) In case of the vessel's arriving at a port of discharge after a jettison of goods, the loss by payment of the freight of the goods, for the whole voyage performed, is one of the consequences of the jettison, and the average should be so adjusted as to include this among the subjects of contribution.(3)

If a part of the cargo which is put into boats for the purpose of floating the ship, when she is aground, or to lighten her that she may pass over a shoal, or bar, is lost, it must be made good by contribution.(4) But a distinction is made between lightening the vessel for this purpose in extraordinary circumstances, as in putting into a port of necessity, and in the ordinary course of the voyage, as in putting into the port of destination. Where it is usual for vessels of the same burthen of that on which the insurance is made, to discharge a part of the cargo on the outside of the bar of the port of destination, there no contribution

(2) Maggrath v. Church, 1 Caines, 214.

(3) 1 Mag. 277. No. E.

Cod. de Com. l. 2. tit. 8. du Fret a. 112.

Goods taken out to lighten the ship that she may pass over a bar.

(4) Dig. l. 4. de leg. Rhod. Cod. de Com.

l. 2. t. 11. n. 238; Stevens,

P. 1. c. 1. s. 1. a. 1. n. 1. Q. Weytsen s. 17.

is to be made, though the goods should be damaged in the lighters.(1)

A vessel having sprung a leak at sea, a part of the goods were taken out to lighten her, that the leak might be found and stopped. She was thus enabled to proceed on her voyage, and finally arrived at her port of destination. The goods taken out were put on board of other ships which were captured. The goods being thus lost, were contributed for in general average.(2)

A ship having run aground in the river of Calcutta, some bags and kegs of dollars were taken from the vessel into the boat, and in going to the shore, the sea being rough, and the boat in danger of foundering, a keg of dollars, and some other part of the boat load, were thrown overboard. A claim being made for contribution by what was saved in the boat, the court said, 'The goods saved in the long-boat, and the goods lost in the jettison from it, were thus exposed together in consequence of a previous peril, and for the purpose of saving what could be saved, without any concert or mutual design of the parties interested. The loss of the plaintiff's keg of dollars, without any regard to the safety of the other effects taken into the boat, affords no case of average. The requisites to a case of that nature, are a contract by which the properties of different persons become exposed to a common peril, and a relief from that peril at the expense of one or more of the concerned, who are thereupon entitled to contribution, provided the benefit was intended, as well as obtained for them. All these requisites are wanting in the case at bar.'(3) If the persons in the boat are to be considered mutual depositaries of each others' goods, and the common depositaries of the goods belonging to the other shippers, some obligations must arise from this trust, though not the same which the owners of the ship assume in a bill of lading or charterparty. Valin thinks it equitable that depositaries should, under such circumstances, be liable to contribution.(4)

The cutting or slipping the cable, for the purpose of putting to sea on account of the danger of going ashore, or running foul of other vessels, or to avoid any other impending peril, is unquestionably a subject of contribution;(5) there is, however, a diversity of opinion respecting the loss of a cable and anchor in consequence of a vessel's being obliged to come to anchor in an unusual and dangerous place. Some are of opinion that this damage, whether it happen in the usual course of the voyage, or under extraordinary circumstances, is a part of the wear and tear of the ship, for which the owner is entitled to no contribution from the owner of the cargo, or indemnity from his underwriters.(6) Others entertain doubts upon this subject.

But if such a loss take place under extraordinary circumstances, within the risks insured against, or in consequence of the unusually violent operation of the perils assumed by the insurers, it is difficult to reduce this damage within the mere wear and tear of the voyage, upon any principle which would not exonerate the insurers from all average on account of damage to the ship. Whether it is to be considered general average de-

The ship having sprung a leak, a part of the goods are put on board of other ships.

Jettison of a part of the goods put into the boat in case of the stranding of the ship.

(1) Poth. Des Av. n. 148 ; 2. Val. 210. du Jet. a. 19. n. ; 1 Emer. 613. c. 12. s. 41.
(2) 1 Mag. 160. Cas. ix.

(3) Whitteridge v. Norris, 6 Mass. Rep. 125.

(4) tom. 2. p. 205. du Jet. a. 15.

Loss by the ship's coming to anchor to avoid a lee-shore or other impending peril.

(5) 1 Mag. 345. cas. xxvii.

(6) Supr. 256; Stevens on Av. P. 1. c. 3. a. ix.

pend upon its being incurred purposely. If a ship, as often happens, come to anchor to avoid going upon a lee-shore, and can escape from this perilous situation only by cutting or slipping her cable, this is a sacrifice intentionally made under extraordinary circumstances, and as directly for the general safety, as any jettison or other sacrifice can be imagined to be, in any case whatever. The loss of the cable and anchor, or the expense of recovering them, seem therefore to come unquestionably within the principles of general average. But if under these circumstances the loss is the consequence of the parting of the cable, or its being chafed off by the rocks, it seems to be more strictly and properly a particular average. This loss is however not unfrequently adjusted as a general average.(1)

(1) See Westkett, tit. Gen. Av. n. 3.

Damage by carrying a press of sail to avoid a lee-shore or enemy.

(2) 1 Emer. 621. c. 12. s. 41.

(3) Stev. on Av. P. 1. c. 1. a. 1. s. v. & c. 3. s. ix.; Covington v. Roberts, 2 N. R. 378. S. C. Marsh. Ins. 543.

(4) See Westkett, tit. Gen. Av. n. 3.

Materials applied to extraordinary uses.

(5) Birkley v. Presgrave, 1 East, 220; Stev. on Av. P. 1. c. 1. a. 1. s. 6.

The abandonment of the boat for the purpose of deceiving the enemy.

(6) tom. 1. p. 622.

Expense of convoy and

If sails or spars are carried away in consequence of carrying a press of sail to keep off a lee-shore, or escape from an enemy, the loss, in some foreign countries, is a subject of contribution,(2) but in England it is not considered to be so. Although the carrying a press of sail is a voluntary act, yet it is done in the usual course of navigation; it is not a voluntary sacrifice of the thing lost. On account of the state of the weather, or the situation of the vessel, the sails and spars, though put only to their ordinary and accustomed use, are more than usually exposed to damage. Any loss, although it happen in consequence of what is thus voluntarily done, and for the general safety, is therefore considered as not coming within the conditions of a general average; but—if not wear and tear—as strictly belonging to the class of particular average, which is always a consequence, more or less remote, of what is voluntarily done in the course of navigating the ship.(3) This rule seems to be pretty justly deduced from acknowledged principles, and it is adopted by some skilful and well informed insurers. But others, whose opinion is entitled to great respect, consider losses of this description to be proper subjects of contribution.(4)

Another case of general average is the application of something belonging to the ship to a use different from that to which it is applied in the ordinary course of navigation. If spars are cut up to construct a temporary rudder, or cordage is used to fasten it, or a cable or rope and spar are put out to assist in steering the ship in case of the loss of the rudder, or a part of the sails and cordage are used at sea in stopping a leak, or *fothering*, as it is called; there can be no question that the loss and damage are subjects of contribution.(5)

Emerigon(6) relates at large, and with great commendation of the captain, a case of average for the loss of the boat of a polacre, commanded by captain Demoulin of Marseilles, who being chased by an enemy, as night came on, extinguished the lights in the ship, and put out his boat with a light on board to deceive the enemy, and divert him from the pursuit, and by this means saved his vessel.

Emerigon enumerates, among the subjects of general average, the expense of hiring convoy, where its protection is essential to

the safety of the ship.(1) Casaregis says,(2) that the loss of the cable and anchor is to be made good by contribution, in case of the master's being unavoidably obliged to slip or cut his cable to keep company with convoy. But no instance of average contribution for these causes appears in the books to have occurred in England or the United States.

Casaregis says, the damage to the ship and cargo by fighting, is particular average, but if the engagement was intended merely for the defence and safety of the ship and cargo, all the expense of the engagement, including that of healing the wounded, and the reward to the men for their bravery, are subjects of contribution.(3) But writers entertain different opinions upon this subject.(4)

In respect to a claim for contribution in case of an English merchant vessel, which had received damage in beating off an American privateer, and incurred expenses in healing the wounded seamen, Chief Justice Gibbs said, 'It was the duty of the sailors to defend the ship. By so doing all parties have been benefited. But in what respect have the captain and crew exceeded their proper duty? What sacrifice have they made which they were not bound to make? The expense of medical and surgical aid must be borne by the parties themselves. Although this may be an ungracious defence, I am of opinion that it does not fall within the principle of general average.'(5) Mr. Holt gives reasons in support of this opinion.(6)

But the reason given by the Chief Justice, would exclude many of the subjects which are acknowledged universally to belong to general average; since it is doubtless the duty of the captain to make a jettison of goods, or cut away the mast, if it is requisite for the general safety. If an armed ship attack another ship with the hope of making prize, and not as a measure of defence, the proceeding is rather of a warlike than of a mercantile character. But where the crew engages another vessel for the mere purpose of defending their own from capture, there seems to be quite as good reason for assessing upon what may be thereby saved, the expense of the ammunition, and that of healing the wounds received in the engagement, and the amount of rewards given to those who distinguish themselves, as can possibly exist in any case for a general contribution. The damage sustained by the ship in the engagement seems to be very similar in principle to the loss of goods put into lighters to prevent a ship from stranding, since in both cases the loss, though not directly and immediately intended, is yet the direct consequence of voluntarily putting the property into a situation of great danger. The voluntary stranding of the ship is another similar case.

Casaregis says, if a number of ships lie near each other in port, and one of them take fire, and a ship near is sunk by the crews of the other ships, to prevent the fire from being communicated to them, the loss of the ship sunk must be contributed for by those saved.(7) The general principle upon which all contributions in general averages are made, seems to comprehend

cutting the cable to keep with convoy.
(1) tom. 1. p. 626. c. 12. a. 41.

Damage in an engagement with an enemy or pirate.

(2) Disc. 46. n. 9.

(3) Disc. 46. n. 43, 44.

(4) Poth. h. t. n. 144; Le Guidon, c. 5. a. 4.

(5) *Taylor v. Curtis*, 1 Holt, 192.

(6) *Id.* 194. n.

(7) Disc. 46. n. 45. 63.

Whether the voluntary destruction of the property of other persons for the safety of the

ship and cargo, is to be contributed for.

(1) Tit. 21. s. 9. n. 3. 2
Mag. 237. No. 983. See Ord. Wisb. a. 55.
Wesk. tit. Gen. Av. n. 2. Langenbeck's Annot. p. 198. cited 1 Mag. 65.

Getting off a vessel that is accidentally stranded.

(2) Des Av. a. 6.
(3) Cod. de Com. l. 2. t. 11. a. 211.
(4) Tom. 2. p. 167.
(5) Tom. 1. p. 614.
(6) Des Av. a. 5.

(7) B. 4. c. 2. p. 348. Am. Ed. 1818.
(8) Disc. 46. n. 32;
De Vincq. ad Q. Weyt. de Av. n. 45.

The intentional stranding of the vessel.

(9) P. 1. c. 1. a. 2.

the case put by Casaregis; since there appears to be as good reason why the ship and cargo saved by the captain's sacrificing the property of a third party for this purpose, should contribute to make compensation for the loss, as that what survives a jettison should be brought into contribution. Upon the same principle, if the crew for the safety of their own ship and cargo, cut the cable of another ship, the loss ought to be made good by a general average on the ship and cargo for the safety of which the damage was done. The foreign marine ordinances contain particular regulations upon this subject, but it does not appear to have been brought under the consideration of either the British or American judicial tribunals.

The ordinance of Hamburg makes the expense a subject of general average, 'when the ship runs aground, and in order to get her off again is forced to have assistance of strangers; or be unloaded.'(1) The French ordinance provided that the expense of putting the vessel afloat should be general average,(2) but the new code restricts this provision to the case of 'stranding with the intention of avoiding a total loss.'(3) Valin(4) and Emerigon(5) evidently understand the provision of the code of 1681 to apply to a case other than that of an intentional stranding. It could not apply to the damage done to the ship, since the same ordinance provided(6) that such damage should be particular average when the vessel was not stranded on purpose.

The expense of discharging the cargo to get a vessel afloat that has been accidentally stranded, and that of reloading the cargo, and the other expenses requisite to enable the vessel to proceed on the voyage, except that of making repairs, are in practice, as I am informed by insurers, brought into general average, where the vessel after being got off proceeds with the same cargo. But in case the lightening of the vessel does not make her float, and other means are necessarily resorted to for this purpose, such as buoying the vessel with casks, or making a channel, it does not appear from decided cases, or any definite and well established practice, that this extraordinary expense is a part of the general average. Jacobsen says, 'the clearing away, if the ship cannot be brought up by mere lightening and raising, are particular average.'(7)

Casaregis says, if the ship might pass over a shoal by a jettison of a part of the cargo, but the captain chooses to strand the ship; all the damage, whether it be loss of the ship, or the expense of getting her afloat, is a subject of contribution.(8)

Mr. Stevens(9) considers it to be doubtful whether contribution is to be made for the damage sustained by a ship, and the expense of getting her afloat, in case of her being intentionally stranded to escape from an enemy, or when she is in danger of foundering at sea, or driving against rocks, or running foul of other ships. But in the very elaborate investigations of this question made in the American courts, it has been generally admitted by the parties, and assumed by the judges, that accord-

ing to the maritime codes, and the treatises on marine law, (a) and also upon general principles, this proceeding comes within the reasons for contribution. (1)

(1) 9 Johns. 9; 2 Serg. & Rawle, 229. 237. n.

One objection was made indeed to considering damage of this sort a subject of contribution in any case, since, it was said, the ship and cargo were exposed to a common danger by an intentional stranding; whereas it was alleged that in general average a part is sacrificed or exposed for the general safety. Respecting this objection to contribution, Mr. Justice Washington said, 'It cannot be said that the loss of the anchor, by cutting the cable, may not expose the whole to danger. A certain injury, with a probability of a total loss, is incurred by the ship for the common safety, and therefore she is entitled to contribution.' (2)

(2) *Gray v. Waln*, 2 Serg. & Rawle, 237. n.

The question which has been principally considered in relation to an intentional stranding, is one which may arise in respect to a jettison, or any other sacrifice, namely, whether the final event is such as to subject the property saved to contribution; it being maintained on the one side, that no general average is to be made, unless the vessel could be got afloat and repaired, and on the other, that this condition is not essential to the claim. This question will be considered subsequently.

The right of claiming contribution in case of the ship's being intentionally run aground, has, in Pennsylvania, been extended to the case of the captain's merely selecting the place for this purpose, where the vessel had parted her cables in a gale, and was driving towards the shore, and must inevitably run aground in some place. The vessel was steered towards Cape May, as 'the most convenient place to save the ship, crew, and property.' The vessel was stranded in a place thought to be the most convenient for obtaining assistance from the land. Chief Justice Tilghman said, 'It is not necessary that the ship should be exposed to greater danger than she otherwise would have been, to make a case of general average. It is sufficient, if a certain loss be incurred for the common benefit.' (3)

(3) *Sims v. Gurney*, 4 Bin. 513.

This seems to be carrying the principle of contribution very far, and yet it is difficult, though perhaps not impracticable, to distinguish this case from those in which the principle is usually applied. When the consequence of a peril has become inevitable, and the acts of the crew are intended to alleviate, instead of avoiding such consequence, it seems hardly to be voluntarily incurring a loss. If a ship driving towards another, and inevitably about to run foul, is managed by the crew in such a manner as in some measure to break and lessen the shock, this, doubtless, would not give occasion for contribution. Where the damage is rather the effect of the direct and inevitable operation of the

(a) Dig. de leg. Rhod. l. 3. Cons. del Mar. c. 192, 193; Roc. de Nav. c. lx. n. 164; 1 Mag. 308. Cas. xxvi.; 2 Mag. 200, 332; Casar. disc. 19. n. 18; Bynk. Q. Jur. Priv. l. 4. c. 24; Ord. de la Marine, tit. des Av. a. 6; Cod. de Com. l. 2. t. 11. a. 211; Poth. Contr. de louage, a. 150; 2 Val. 168. des Av. a. 6; Voet ad Pandect. l. 4. c. 24. tit. de Jactu.

peril, than of the act of the master and crew induced by the peril, it seems more properly to belong to particular average. Mr. Stevens is of opinion, that damage occasioned by intentional running aground on account of perils of the seas, is not a subject of contribution, but he acknowledges that his opinion is not supported by either custom or authority.(1) In regard to damage from this cause, and also by voluntary stranding to avoid an enemy, he says, 'both these cases require great consideration before they are admitted under the head of undisputed general average claims.'(2) But it would require very weighty and conclusive reasons to shake the authority of a general custom, supported by the opinions of other writers and the decisions of the courts.

(1) P. 1. c. 1.
a. 2. s. [a.]

(2) Ib. s. [b.]

Expense of salvage.

(3) Heyliger
v. New York
Firem. Ins.
Co. 11 Johns.
85.

Ransom.

(4) Abb. 331.
1 Mag. 64.
Beaw. c. 1.
tit. Salvage,
&c.

(5) Nesbitt v.
Lushington,
4 T. R. 783.

(6) Emer.
tom. 1.

p. 474, 629,
630; Lopes
v. Winter,
Pothleth's
Dict. tit.
Average.

(7) 22 Geo.
III. c. 25;
35 Geo. III.
c. 66. s. 37,
38, 39.

Compromise with captors.

Persons who save property after shipwreck, or who recapture it, are entitled to salvage, and the expense of salvage is paid by the property saved. The expense of salvage is accordingly paid by the owners of the property or their insurers,(3) and where the salvage allowed is in the proportion of the value of the different interests, as in the case of recapture particularly, it becomes a general average.

Goods or money given to pirates or plunderers, by way of composition, must be contributed for by the property thereby rescued.(4) But if they seize a part from choice or casualty, and without any composition, and the rest is not saved by the sacrifice of what is taken, it is a particular average.(5)

It was formerly the practice to ransom vessels captured by the public enemy, and to give hostages as security for the payment of the ransom, in which cases the amount of the ransom, as well as the expenses of the hostage, during his detention, were settled by general contribution.(6) But, more recently, laws have been enacted prohibiting compositions with a public enemy,(7) and such compositions have been considered illegal although not prohibited by specific laws. The purchase of the captured vessel or cargo at a sale, under a condemnation in a court of the enemy, is considered to be no less a trading with the enemy than an agreement made directly with the captors at sea.(a)

If the compromise be lawful, as in the case between neutrals and belligerent captors, the amount must be contributed by the property on account of which it is made. 'When the progress of the voyage is interrupted by capture or other casualties, the master of the vessel becomes of necessity an authorized agent for the owners, freighters, insurers, and all concerned, and whatever he undertakes, and whatever expenses he may incur, fairly directed to the benefit of all concerned, become a charge upon them respectively, as much as when recovered under a special authority and license, and pursuant to an immediate request. The request and authorities are necessarily implied, when the master exercises his discretion and judgment fairly. When his

(a) Havelock v. Rockwood, 8 T. R. 268. In France it was allowed to give but not to take a ransom. Emer. tom. 1. p. 465, 630.

proceedings are within the usual course of business, as in the event of sea-damage, when he provides suitable repairs necessary for the prosecution of the voyage, the expense may be more readily acquiesced in; but the case is not stronger, than a provision fairly made, in a case of unusual and unforeseen casualties. The implied authority and duty of the master, enable him in both cases to engage the personal responsibility of his employers on every occasion where his discretion is necessarily exercised to secure the purposes of the voyage.'(1)

(1) *Douglas v. Moody*, 9 Mass. Rep. 551.

In case of the capture of a neutral by a belligerent, on suspicion of there being enemy's goods on board, it was held that the amount paid by way of compromise should be contributed in general average; for, though it did not appear that there were any goods of the other belligerent on board, or that there was any ground for a condemnation of the vessel, or any part of the cargo, 'yet they were under detention, and there was some danger that the voyage might be defeated; and it was certain that it would be retarded by admiralty proceedings, if an adjudication had been insisted on.'(2)

(2) *Ib.*
(3) *Leavenworth v. De-lafield*, 1 Caines, 573.

Under such circumstances the master is authorized to act for all concerned, and his acts done with good faith, and according to his best discretion, are binding upon the owners and ship-pers.(3)

Where two thirds of the property was given up to the captors, though the other third sold at Naples, whither the vessel was carried by the captors, for more than the whole would have sold for at Messina, to which port the vessel was destined; yet it was held that a reasonable compromise so made was binding upon the insurers, and the state of the markets did not affect their liability, since they are not bound to make indemnity on account of a bad market, nor entitled to the advantage of a good one, unless they become owners of the property by abandonment.(4)

(4) *Welles v. Gray*, 10 Mass. Rep. 42.

The captain's being a part owner will not render a compromise, that is prudently and honestly made, the less binding upon the other part-owners. In making the composition his acts are considered to be done in his character of master and agent of all concerned.(5) If the property is given up to the captors, and a sum is received by the master, instead of being paid, by way of composition, the transaction will be no less binding upon those concerned, and upon the underwriters.(6)

(5) *Waddell v. Col. Ins. Co.* 10 Johns. 61.

(6) *Clarkson v. Phœn. Ins. Co.* 9 Johns. 1.

But if only a part of the cargo be in jeopardy, and a composition is made for such part, it has been held that no general contribution can be demanded.(7)

Compromise for a part of the property.

(7) *Vandenhoevel v. Unit. Ins. Co.* 1 Johns. 406.

Section 3. No Contribution is made unless the Impending Peril is avoided.

As a contribution on account of a jettison, or any sacrifice of a part of the general interest at risk, is made by what survives, it follows, that if nothing be saved, no contribution is to be made.

No contribution is to be made for a

jettison unless the impending danger is averted.

But it is not universally true, on the other hand, that wherever, after a sacrifice of a part for the general safety, any thing is finally saved and comes to the use of the proprietor, it must contribute for the loss by jettison. The rule laid down in the treatises and marine ordinances on this subject, is, that if the impending peril, on account of which the jettison is made, is averted, what is finally saved must contribute for the loss. A jettison is made for the common safety, and contribution is to be made only as far as the common safety is secured.

If a jettison is made to prevent shipwreck or capture, and notwithstanding the jettison, the ship is wrecked or captured, no contribution is to be made. Valin says, the ship ought to be effectually saved, so that she may continue her voyage; for if after the jettison, the tempest abate for a short time and then recommences, and the vessel is wrecked, although it should be some days after the jettison was made, it is not a case of contribution on account of any goods that may be saved from the wreck.(1) Magens restrains the right of demanding contribution within still narrower limits.(2) But a more liberal construction has been generally adopted; and it has been considered sufficient to bring a case within the principles of contribution if the specific effect apprehended from a peril is avoided, and another loss is purposely substituted, even though the loss purposely incurred is of the same kind with that averted.(3)

(1) Tom. 2. p. 207. du Jet. a. 16.
(2) Vol. 1. p. 56.
(3) Q. Weyt- sen, 237; Le Guidon, c. 133; Caze v. Richards, 2 Serg. & Rawle, 237. n.

Intentional stranding.

The question relating to the kind and degree of safety requisite to be obtained in order to constitute a ground of contribution, has been very elaborately considered in cases of intentional stranding. If the vessel is stranded to avoid capture, the loss incurred is of a different kind from that which was threatened. So if a vessel is run ashore on account of the danger of her foundering and sinking at sea, or of running foul of other vessels, the loss substituted seems to be sufficiently distinguished from that which was impending. But if a vessel in danger of being driven ashore by the winds and sea, is purposely run ashore, the loss incurred is similar to that from which it is proposed to escape. If going ashore merely be considered the impending peril, it is not avoided. But if shipwreck is to be considered to be the impending peril, it is avoided in case the ship is stranded without being wrecked, and in such a manner that she may be got off in a condition to prosecute the voyage; she is saved from the impending peril. This is the distinction adopted in the French code.(4) But if the total destruction of ship and cargo is considered to be the impending peril, it would be avoided by any measures which might result in saving any part of either.

(4) Code. de Com. l. 2. tit. 11. a. 211.

Different opinions have been given on this subject. In a case that occurred in New York, a ship in the Texel dragged her anchors during a gale, and being in danger of running foul of other ships that were adrift, was cut from her cables and purposely run ashore, and could not be got afloat again; but the cargo was saved. A contribution being claimed for the loss of

the ship, Chief Justice Kent, giving the opinion of the court, said, 'If a ship to avoid impending danger be voluntarily run ashore, and is afterwards recovered and performs her voyage, the damages resulting from this sacrifice are to be borne by general average. There cannot be a doubt as to this rule. But a more difficult question is, whether there is to be a contribution if the ship be destroyed. The books have not treated this question with sufficient perspicuity and precision; but the weight of authority, no less than the reason of the rule, is against contribution.(1) When a ship is voluntarily run ashore, the intention is not to destroy the ship, but to place her in less peril, and if she go to pieces, or is otherwise lost, it is not to be attributed exclusively to the act of the master, but to the direct and more immediate operation of other causes. He does an act hazardous to the vessel and cargo, in order to escape from a more pressing danger, as a storm, or the pursuit of an enemy or pirate. The stranding may be an act done for the common safety, but this cannot be said of the subsequent shipwreck or capture. If the ship be lost and the cargo saved, it is saved *tanquam ex incendio*.'(2)

A vessel being chased by the enemy, in Delaware Bay, finding no other means of escape, was purposely run ashore. The crew had taken out and saved a part of the cargo, when they were compelled to leave the vessel, by the enemy, who set fire to her and she was burnt down to the water's edge. The crew afterwards recovered other parts of the cargo, and some articles belonging to the vessel. Upon the question, whether a contribution should be made, Mr. Justice Washington said, 'To constitute a claim for contribution, the jettison must be successful in part at least, for if the ship was lost by the peril which it was intended to avert, there is no contribution due. The principle fairly to be extracted from the maritime law, is, that the part saved shall contribute, provided the object for which the sacrifice was made was attained.' It was objected to a contribution in this case, that the loss of the vessel was not intended. The judge said, this was not necessary, if it were, the loss of goods put into lighters, to lighten the ship, would not be contributed for, since 'the probability is that they will be saved. The motive for the act in relation to the rest of the property, and not the intention in relation to the thing sacrificed or exposed to danger, gives rise to contribution.'

A reason urged against contribution in this case was, that the principle on which contribution is allowed, is the safety and prosecution of the voyage, which cannot be effected if the vessel is totally lost. The judge said, 'This reason appears to be entirely fanciful. It has no authority to stand upon; it is inconsistent with other cases, where the vessel is lost, and yet contribution is allowed. It can scarcely be denied that in cases of such imminent danger as to justify the desperate remedy of stranding the vessel, the object must be the preservation of the lives of those on board, and the safety of the cargo, and perhaps of the vessel. All hopes of further prosecution of the voyage must

(1) Dig. 14. 2. 5; Voet ad Pand. l. 14. t. 2. s. 5; Bynk. Quess. Jur. Priv. l. 4. c. 24. de Jac-tu; Ord. Konigsb. 2 Mag. 200; Cleirac sur. Jug. Oler. p. 42; Le Guid. c. 5. s. 28; Ord. Louis XIV. des Av. a. 16; des Contrib. a. 15, 16; 2 Val. 168; Hub. Prael. ad Pand. l. 14. t. 2. s. 4; 1 Emer. 614. 616; Roc. de Nav. n. 60; Ord. Rot. a. 101; Ord. Copenh. tit. Av. a. 5; Malynes, 110; Mol. b. 2. c. 6. s. 12; Beawes, tit. Salv. &c. (2) Bradhurst v. Col. Ins. Co. 9 Johns. 9.

(1) *Caze v. Richards*, 2 Serg. & Rawle, 237. n.

(2) *Gray v. Waln*, 2 Serg. & Rawle, 229.

Whether the jettison must appear to have conducted to the general safety to be the ground of contribution.

(3) *Sims v. Gurney*, 4 Bin. 524.

(4) P. 537.

(5) Vol. 2. p. 205. du Jet. a. 15.

(6) *Ib.* p. 207. a. 16.

(7) *Tit. Salvage Average, &c.*

in general be abandoned, though there may be a possibility that it may be resumed. But if this reason be a sound one, what will be said of the case where a jettison is made of the whole cargo, or so great a part of it as to render the voyage not worth pursuing? But what seems to be conclusive is, that if the ship survive the danger which the jettison was made to avert, and is totally lost the next day, the goods saved contribute. (1) This opinion was adopted in Pennsylvania. (2)

Chief Justice Tilghman says, that, to make a case of general average, it is necessary that a sacrifice of a part 'should be conducive to the saving of the rest.' (3) This doctrine might make a very hard case for the party whose property was sacrificed. Upon this principle, if a part of the goods are thrown overboard when the ship and cargo is in imminent danger, and the only probable means of saving any thing is by making a jettison, which is not only justified but required by the occasion, and it would be a neglect and fault in the master not to resort to this measure, and, by the shifting of the wind or some fortunate accident, it turns out that the jettison did not conduce to the general safety, but that the ship and cargo would have sustained no damage whatever, though no jettison had been made, no contribution can be claimed by the party who has lost his goods. Mr. Marshall says, 'This is quite unreasonable and unjust.' (4)

The French code provides, that, 'if the jettison do not save the ship, there is no ground of contribution.' (a) This doctrine is borrowed from the Roman law. (b) Valin says, that to constitute a ground of contribution, it is requisite that the jettison should be made for the common safety, and that the common safety should be effected by it; (5) the ship must have been saved by the jettison. (6) Beawes says, that to make a case of contribution for jettison, it must appear 'that the ship and cargo, or a part of them, has been saved by that means.' (7) This doctrine is stated in similar expressions in many instances but no case has to my knowledge occurred, in which a contribution for a jettison has been denied, where the rest of the property has been saved, merely upon the ground that the jettison did not conduce to its safety.

Section 4. *Expense of Delay to Refit on account of Sea-perils.*

Seeking a port to refit.

Whether the expense of putting into

If in consequence of some disaster it become necessary to the safety of the ship and cargo, to put into a port out of the course of the voyage to refit, it is universally held that more or less of the expense is to be defrayed by contribution.

It is intimated in some instances that the expense of putting into port is a subject of general contribution, only when the

(a) *Cod. de Com. l. 2. t. 12. a. 234*; *Ord. tit. du Jet. a. 15.* (b) *Dig. 14. 2. 4. 1.* *Eorum enim merces non possunt videri servandæ navis causa jactæ esse, quæ periit.*

master puts in to repair that which he has voluntarily sacrificed.'(1) Mr. Abbott(2) says, 'If the damage to be repaired be in itself an object of contribution, it seems reasonable that all the expenses necessary, although collateral to the reparation, should also be the objects of contribution.' An article of the French code seems to favour this doctrine.(a)

But Lord Ellenborough said, in case of a vessel's putting back to repair sea-damage, 'If the return to port was necessary for the general safety, it seems that the expenses unavoidably incurred by such necessity may be considered as the subject of general average. It is not so much a question, whether the first cause of the damage was owing to this or that accident, as whether the effect produced was such as to incapacitate the ship, without endangering the whole concern, from farther prosecuting her voyage, unless she returned to port and removed the impediment.'(3) This is the doctrine adopted in the United States, as will appear by the cases subsequently cited.

Mr. Justice Washington says, 'If the injury to the ship result from gradual and ordinary decay,' and not 'from some extraordinary violence or peril, the expenses incurred by going in to repair, will not be a subject of general average.'(4) The ship in question was seaworthy at the commencement of the voyage, and no fault is imputed to the owner or master. The necessity of going into port arose from a damage or loss which it belonged to the owner to repair at his own expense; but so it does when the vessel puts into port on account of sea-damage. Where the decay or injury is such as could not have been foreseen and prevented, it seems difficult to make a distinction in regard to allowing contribution for the expenses of going in to refit, whether the necessity arise from those extraordinary accidents, for which insurers on the ship are answerable, or from unexpected decay, damage by rats or worms, wear and tear, or failure of provisions or water, on account of the unusual length of the passage, or any other defect or injury, which the owner must supply at his own expense, but which he could not have anticipated.

The expenses of mere delay in the course of the voyage may be the subject of general contribution, but it is necessary for his purpose that the voyage should be interrupted, and that the delay should be out of the ordinary course of things.

The expenses of delay at quarantine, whether for the usual or for an unusual time, are not contributed for in general average.(b)

If a vessel is delayed by being frozen up, in some harbour in the regular course of her voyage, the expenses occasioned by such delay are not a subject of contribution.(5) But Magens says, if a vessel is frozen up in a port, where the master put in voluntarily to repair

port to repair damage that is particular average is to be contributed for.

(1) *Plummer v. Wildman*, 3 M. & S. 482.

(2) Part III. c. 8. s. 8. See remarks of Kent, C. J. *Walden v. Le Roy*, 2 Caines, 263.

Necessity of going into port on account of the vessel's becoming unseaworthy, without any storm or extraordinary occurrence.

(3) *Plummer v. Wildman*, 3 M. & S. 482. See also *Williams v. Lond. Ass. Co.* 1 M. & S. 318.

(4) *Ross v. Sloop Active*, Condry's *Marsh*. 542. n.

Delay at quarantine.

Delay by the vessel's being frozen up.

(5) 1 Mag. 67. See also *Bynk. Q. J. Priv.* l. 4. c. 25.

(a) Code de Com. l. 2. t. xi. a. 211. Les loyers, &c. sont avaries communes pendant les réparations des dommages volontairement soufferts. (b) 1 Emcr. 633; 1 Mag. 67. s. 57. The ordinance of Hamburg makes these expenses general average, 1 Mag. 65. s. 57.

(1) Vol. 1.
p. 67. s. 57.

Delay at the
port of desti-
nation to
make repairs.

(2) Dunham
v. Com. Ins.
Co. 11 Johns.
315.

(3) Quest.
Jur. Priv. 1. 4.
c. 25.

(4) p. 340.

(5) p. 341.

Expenses of
delay at sea
to make re-
pairs.

tarily to repair, the expenses of detention including wages and provisions after, as well as before, the time of her being frozen up, are a part of the general average.(1)

A ship being detained at Liverpool, her port of destination, after the cargo was delivered, to repair damage sustained before it was unloaded; Chief Justice Thompson said, 'The expenses during the time the vessel was detained at Liverpool cannot be brought into general average. They were not incurred for the benefit of cargo or freight. The cargo had been delivered, and the freight earned, before the expenses in question were incurred.'(2)

But if the voyage is interrupted and the vessel ceases to pursue her course, on account of the necessity of repairs, the expenses are general average. A vessel being in the port of Genoa in the course of her voyage, after she was loaded and completely ready for sea, sustained sea-damage in a gale of wind, which made it necessary to delay a short time to make repairs. The insurers paid their proportion of a general average of the expenses of this delay, without making any objection. But the circumstance of the vessel's being completely ready to sail, before the damage happened, was considered to be material.

Bynkershoek(3) mentions three remarkable cases of claims, made in Holland for contribution, on account of a delay of the voyage; one of which was in the courts seven, another ten, and the third sixteen years. In one, the vessel sailed from Holland, during a war between that country and France, on a voyage to Italy, under convoy of a ship of war for Portsmouth, where she delayed a year for another convoy, under which she proceeded to Cadiz, where after waiting a year for other convoy, she proceeded to Italy. Respecting a claim for contribution on account of the expense of these delays, different opinions were entertained in the courts, but the claim was finally allowed. Bynkershoek, who was a member of one of the courts before which the claim was brought, was of opinion, that no contribution ought to have been made. Mr. Abbott concurs in his opinion.(4) In the second case, which was similar to this, the claim was rejected in the Dutch courts.

The third case was that of a ship freighted from Amsterdam to Cadiz, with a stipulation to sail with convoy at least as far as Lisbon. The vessel put into Lisbon, on account of danger from a fleet of privateers, where she waited six months before she could safely proceed to Cadiz. This case came before the same courts successively, in all of which the decision was in favour of a general average, and Bynkershoek approved of the decision; with whom Mr. Abbott concurs,(5) because 'the master put into port to avoid an *extraordinary* and *impending* peril.'

A vessel bound on a voyage from Smyrna to Boston, met with sea-damage, to repair which she took on board two carpenters from a public ship, and delayed a few days at sea, to make repairs, instead of putting into port for this purpose. The underwriters made no objection to paying the expenses of this delay.

Where it becomes necessary to seek a port to refit, in consequence of damage by cutting away the mast, or other voluntary sacrifice, the repairs of such damage will of course be a subject of general average. But if the vessel is obliged to seek port to refit in consequence of sea-damage, or any injury not purposely incurred, though the expenses of going into a port of necessity is defrayed by contribution, yet the repairs are a particular average on the ship. Mr. Justice Bayley says, 'If the repairs were merely such as were necessary to enable the ship to prosecute her voyage home, and were afterwards of no benefit to the ship, such repairs would properly come under general average.'⁽¹⁾

In what cases the repairs of the ship are to be contributed for in general average.

(1) 3 M. & S. 482.

The expenses of going in to refit, to be contributed for in general average, consist of the port charges, pilotage, light money; unloading⁽²⁾ and reloading the cargo; cooping casks when rendered necessary by the unloading of the cargo; storage; hire of anchors, cables, or boats; wages of people employed to guard the property, or to cut the ice in order to get the ship into, or out of, port, or otherwise to assist the crew in entering or leaving the port; brokerage; postage; fees of notaries for protests, &c.; and in general all the expenses incidental to the interruption of the voyage for the general safety.

Expenses incidental to the interruption of the voyage.

(2) The Copenhagen, 1 Rob. 204.

It seems formerly to have been a question of doubt, whether the expense of wages and provisions during a delay, and going out of the course of the voyage to refit, were to be contributed or in general average.⁽³⁾ It has however been very distinctly settled in England that this expense is not to be contributed for.

The wages and provisions of the seamen during delay to refit are not general average in England.

A ship insured on a voyage from London to Marseilles and thence to the West Indies, was compelled in the course of the voyage to put into port Mahon in Minorca, where she was detained a long time for repairs. The expense of wages and provisions of the crew during this time was claimed of the insurers. Lord Mansfield was of opinion that this claim could not be allowed.⁽⁴⁾

(3) 1 Mag. p. 64. 69. s. 57; Beawes, tit. Salv. Av. &c.; Abbott on Mer. Ships, P. III. c. 8. s. 8; 2 T. R. 40.

In a subsequent case of a claim for wages and provisions, during the time while the ship went from Bengal to Bombay to repair, Lord Mansfield held, as Mr. Park says he frequently has since, that the insurers were not liable for this expense. But he said, 'There may be cases, where exceptions to the general rule should be allowed; but in order to consider a case as excepted it must be an expense absolutely necessary, and such as could not be avoided, owing to some of the perils stated in the policy.'⁽⁵⁾

(4) Fletcher v. Poole, Park, 89.

(5) Lateward v. Curling, Park, 207; Marsh. 539.

The subject of general average was not particularly considered in these cases, but as nothing was recovered, under a policy on the ship, for wages and provisions, this was in effect deciding that these expenses are neither a particular nor general average, since, if they had been considered a loss of either of these descriptions, something would have been recovered on this account.

In a case of insurance on a ship and cargo from Ostend to Dominica, the ship met with bad weather in the course of

the voyage, and the crew threatened to take the command of the ship, unless the master would make the nearest port. He accordingly put into Ferrol to repair, where he was detained during the time requisite for making the repairs, and after having made the repairs and being ready to sail, he was detained thirty-seven days by the order of the governor. Mr. Justice Buller was of opinion that the insurers were not liable for the wages and provisions during the detention.(1)

(1) *Eden v. Poole, Park*, 91.

Under a policy on goods from London to Lisbon, the master, discovering that the bowsprit bitts had given way, in consequence of the violence of the winds and waves, and the labouring of the ship, and thinking it dangerous to proceed without repairs, put into Cowes 'for the purpose of securing the bowsprit.' The assured claimed a general average loss on account of the *wages and provisions* during the detention, as well as the *expense of repairing* the bowsprit. Lord Ellenborough said, 'General average must lay its foundation in a sacrifice of a part for the sake of the rest, but here was no sacrifice of any part. The several items of loss are none of them the subject of general average by the laws of England.'(2)

(2) *Power v. Whitmore*, 4 M. & S. 141.

In case of a vessel's putting into a port to refit, wages and provisions are contributed for in the United States.

The decisions of the American courts, and the practice of insurers, concur in allowing the wages and provisions as a part of the average loss in case of an interruption of the voyage to refit. A vessel on a voyage from the Cape de Verd Islands to Rhode Island, was compelled, on account of damage to her sails and rigging, to put into Norfolk to refit, and the question was made, whether the expense of wages and provisions during the delay for this purpose, was a subject of contribution.

Mr. Justice Sewall, in giving the opinion of the court, said, 'A liberal construction in this respect appears conducive to the interest of insurers, in the benefit they derive from every reasonable precaution against impending and extraordinary risks, such as the continuing at sea with a vessel disabled in her sails and rigging. By rendering the concerned liable in a general contribution to defray the extraordinary expenses of seeking a port, and of the detention there to refit, the hazard of opposing interest is avoided; and a security common to all concerned is purchased, as it ought to be, at their common risk and expense. There may be some difficulty in deciding whether a detention is or is not a case of general average. But where a case is established to be of that nature, and sailors' wages and provisions make a part of the expenses necessarily incurred, this seems to be a sufficient reason for allowing them. The seeking the port of Norfolk to refit, and the stay there, were a deliberate and necessary departure from the course of the voyage for the benefit of all concerned. This was therefore a case of general average, and the sailors' wages and provisions, forming suitable items of the expenses thereby incurred, are to be allowed.'(3)

(3) *Padelford v. Boardman*, 4 Mass. Rep. 548.

(4) *Clark v. Unit. F. Mar. Ins. Co.* 7 Mas. Rep. 365.

The principles of this decision have been since confirmed by the same court.(4) The same doctrine had been previously adopted in New York, in the case of a vessel compelled to bear away for

forfolk, to refit, in consequence of having sprung a leak in a gale of wind. Chief Justice Kent, giving the opinion of the court, said, 'It is necessary that the mariners should remain on the purpose of proceeding to the port of discharge, as soon as the inevitable misfortune creating the delay is removed. The cargo might be sacrificed at the intermediate port, if the crew were not to be retained; and the expenses of their detention, being for the common benefit, ought to be apportioned as common burthen.'⁽¹⁾ From this opinion Mr. Justice Livingstone dissented, in an elaborate argument. He said, the reason alleged in favour of the average, that the going in was for the general benefit, proved too much, as it would bring the repairs of the ship into general average, as they were for the general benefit. He thought the expenses of going in should be borne by freight, and constitute a loss under a policy upon that interest. But the court adhered to its opinion in a subsequent case.⁽²⁾

But wages paid unnecessarily, and through mistake, are not subject of contribution. A ship being wrecked at the Isle of France, where she had put in for the purpose of refitting, the American consul there, under a mistaken construction of law,⁽³⁾ directed the captain to pay three months' extra wages to a part of the crew. It was insisted on the part of the assured on ship and cargo, that this expense was a proper subject of contribution. Mr. Justice Wilde, giving the opinion of the court, said, This loss arose partly from the mistake of the consul, and partly from the loss of the vessel. It was not the necessary consequence of putting into the Isle of France; it is not therefore a charge of general average.'⁽⁴⁾

(1) *Walden v. Le Roy*, 2 Caines, 262.

See also *Henshaw v. Mar. Ins. Co.* 2 Caines, 274; *Saltus v. Com. Ins. Co.* 10 Johns. 487.

(2) *Barker v. Phon. Ins. Co.* 8 Johns. 307.

See also the opinion of Judge Davis, *Breed v. Ship Venus*, Abbott, 337. n. Story's Ed. 1810, and *Sage v. Middlet. Ins. Co.* 2 Con. Rep. 239.

Wages paid unnecessarily and through mistake.

(3) U. States Laws, 7th Cong. 2d sess. c. 62, s. 3.

(4) *Dodge v. Union Mar. Ins. Co.* 17 Mass. Rep. 477.

Section 5. *Expense of Delay to claim Captured Property.*

The expenses attending the delay, and making claim for the vessel and cargo, in case of capture, are a subject of general contribution.^(a)

In 1748, the officers of the London Assurance Company said, respecting a case of detention for reclaiming the property, 'In law it is not made out yet in England, that men's wages and victuals, by such detentions, are to be admitted into general average; but the custom rather is for the owners of the ship to bear them.'^(b) Magens however thinks they ought to be a part of the general average.⁽⁵⁾ Ricard,⁽⁶⁾ Adrian Verwer,⁽⁷⁾ Westcott⁽⁸⁾ and Beawes,⁽⁹⁾ all express, or strongly imply the same opinion.

It seems from a decision in England on a case of detention with a hostile purpose, though not a capture, that there is no dis-

Expenses of claiming property captured.

Whether wages and provisions are allowed during delay to claim captured property.

(5) Vol. i. p. 69. s. 57. p. 345. n. (a)

(6) p. 297.

(7) *Weak. tit. Wages*, n. 11.

(8) *Ib.*

(9) *Tit. Salvage, &c.* p. 160.

(a) Beawes, *tit. Salvage, Average, &c.* p. 157; *Emer. tom.* 1. p. 631; *Mod. de Com.* 1. 2. tit. 11. a. 211. n. 6; *Speyer v. New York Ins. Co.* 7 Johns. 89; *Jumel v. Mar. Ins. Co.* 7 Johns. 412; *Kingston v. Girard*, Dall. 274. (b) 1 Mag. 344. Cas. xxvii. No. N.

(1) *Sharp v. Gladstone*, 7 East, 24.

inction between these expenses and those incident to a detention by capture.(1)

(2) *Leavenworth v. Dalafield*, 1 Caines, 573.

A ship bound on a voyage from New York to Havre de Grace, was captured and carried into Ramsgate, in England, and detained from the 4th of September to the 4th of January following, when the property was restored, and the vessel proceeded to her port of destination. The expenses for wages and provisions during this detention, were claimed as general average. Mr. Justice Livingston, giving the opinion of the court, said, 'The expenses here in dispute, are incurred for the common benefit, in consequence of a *vis major*. It was said in the argument that the master was not obliged to detain his crew. It is sufficient that he has done it in the present case; that he has acted with good faith, and that such detention was manifestly for the general weal. The cargo might have been sacrificed in England, if the crew had been immediately discharged.' And these expenses were accordingly included in the average.(2)

(3) *Penny v. New York Ins. Co.* 3 Caines, 155.

Mr. Justice Livingston, giving the opinion of the court respecting a claim for the expenses of wages and provisions during a detention by capture, said, 'In the case of detention by capture, the charterparty is dissolved, and the captain (who is generally agent for all parties, to act for the best under every misfortune) reclaims both vessel and cargo, and without being under contract or obliged so to do, retains the crew for the purpose of preventing an entire loss, and pursuing the voyage if the property be acquitted; whereas he might dismiss them at once, and the underwriter be called on for a total loss. The expenses therefore incurred by a claim of this nature being evidently for the general benefit, if not impliedly at the general request, and not the effect of a previous stipulation or contract, which is at an end by the capture; it is but reasonable they should be defrayed in the same way.'(3)

The same question has occurred in Massachusetts, upon a charterparty by which a vessel was chartered at a certain rate per month, for a voyage from the United States to Spain and St. Ubes and back, during which voyage she was captured and carried into Gibraltar, where she was detained under admiralty proceedings from the 6th of January until the 10th of May, when she was acquitted and proceeded on her voyage, and finally arrived in the United States. Mr. Justice Jackson, giving the opinion of the court, said, 'The necessary costs and charges incurred in claiming and obtaining the restoration of the ship and cargo, are undoubtedly to be allowed as a general average. As to the wages and provisions of the crew we are unable to see any ground on which we can allow them. The only case in which this charge has been allowed, in general average in our courts, was where it was necessary to go into port to repair damages. Here it is to be observed the delay was voluntarily incurred by the master; the mind and agency of man were employed in producing it; and this circumstance is deemed essential in every case of general average. If the

service for which contribution is claimed, results from a previous obligation of the party rendering it, or is the effect of a previous stipulation or contract, the compensation for that service is not to be defrayed in this manner;¹ and then, assuming the position that the contract for wages between the owners and mariners is not necessarily dissolved by the capture, it is inferred that the wages earned, during the detention, are due from the owners, 'in consequence of a previous stipulation,' and are therefore not a subject of general average.⁽¹⁾

(1) *Spafford v. Dodge*, 14 Mass. Rep. 66.

But the court is of opinion, that if the time of service of the crew had expired, and the master should, on arriving at the port to which the vessel is carried by the captors, enter into new obligations to the same crew, by shipping them again, or should ship another in their stead; the wages would be a subject of contribution. If the retaining the crew is necessary or expedient in attempting to avert a total loss for which the insurers would be answerable, it does not appear on what ground it is material, whether they are retained in virtue of a previous contract, or one made at the time when the detention commences. The wages of the crew during delay by going out of the course of the voyage to refit, are due in consequence of a previous contract; and yet those wages are allowed in general average. If in case of detention by capture the crew were retained merely because the master thought himself obliged by his contract to retain them, and not because the retaining them was thought to be of any importance in regard to the safety of the ship and cargo, or the preventing a total loss by the breaking up of the voyage, the charges of their maintenance and their wages would not seem to be a proper subject of contribution. But this does not appear to be the case contemplated by the court.

(2) *Watson v. Mar. Ins. Co.*
7 Johns. 57.
(3) *Tit. des Av. a. 7.*
(4) *Liv. 2. tit. xi. des Av. a. 211.*
(5) *Traité des Charte-parties*, n. 85.
(6) *Tom. 1. p. 539.*
(7) *Tom. 2. p. 168.*
(8) *Penny v. New York Ins. Co.* 3 Caines, 155.

If in case of capture, any part of the expenses is incurred on the separate account of the ship or cargo, such part is not a subject of contribution. A vessel was seized by the French, under the Milan decree, and after the seizure the cargo was discharged and delivered to the consignees, upon their giving security to abide the event of the trial; the court was of opinion that the expenses incurred by the captain, 'before he ceased to have charge of the cargo,' were general average. But the subsequent expenses being incurred expressly on account of the cargo, were considered to be particular average.⁽²⁾

The expenses of detention by capture, on account of the cargo only, are not a subject of general average.

The French ordinance⁽³⁾ and code⁽⁴⁾ provide that the expenses of detention, including wages and provisions, are to be contributed for when the vessel is chartered by the month, but not otherwise. Pothier attempts to give the reason of this distinction,⁽⁵⁾ in which Emerigon thinks he has succeeded.⁽⁶⁾ Valin⁽⁷⁾ says, it is not possible to assign the reason. The same distinction was proposed to the supreme court of New York, but was not adopted by that court.⁽⁸⁾

Whether chartering the vessel by the month has any effect in respect to a contribution for the expenses of detention.

Section 6. *Expense of Detention by Embargo.*

(1) *Ins. Co. of N. A. v. Jones*, 2 Bin. 547; 4 Dall. 246.

(2) *Tit. Salvage, Average, &c.* p. 160.

It has been decided in Pennsylvania, in a very elaborate case, that wages and provisions, with other expenses, during detention by embargo, are general average.⁽¹⁾ But the current of authorities is decidedly against this doctrine, and the reason assigned by Beawes⁽²⁾ for the distinction between this case and that of capture, for which he cites Ricardo and Adrian Verwer, is, 'that in case of capture the crew remained on board to take care of the vessel whilst they were endeavouring to reclaim her, and those expenses were occasioned with the sole view of preserving the ship and cargo for the proprietors; but in the case of mere detention, there is no room for such a pretence, as the embargoing sovereign would not have either ship or cargo, but only hinder their departure for some particular reasons.' But he adds, 'Nevertheless, it seems that both reason and justice require that the expense and wages of a ship's company detained in port by a prince's order, should be brought into a general average; for if on one side the merchants who have laden her, are considerable sufferers by the delay, the owners of the ship are not less so, more especially if the crew is large and the detention long.'

(3) *Robertson v. Ewer*, 1 T. R. 127.

It was decided in the time of Lord Mansfield, that the expenses of detention by embargo are not the subject of general average. The reasons given were, that there was no authority in favour of an average in this case; that wages and provisions are never allowed in settling a policy on the ship, and that the insurance is on the body of the ship, the tackle, and furniture, and not on the voyage or crew; and accordingly, Mr. Justice Buller said, the ship and tackle being safe, the court look no farther. Lord Mansfield stated that the allowance of this claim would be 'contrary to the constant practice.'⁽³⁾ This doctrine has been pretty generally adopted, but it must, as it should seem, depend upon reasons different from those above stated, since those reasons apply to other cases of detention no less than to a detention by embargo.

(4) *Martin v. Salem Ins. Co.* 2 Mass. Rep. 429.

In respect to a claim of this description, including the possible earnings of the vessel during the time of detention, the court in Massachusetts said, 'If provisions may be taken to be included in an insurance upon the vessel and her appurtenances, yet such insurance is understood to be against accidents by which the vessel's provisions are destroyed or taken specifically from their proper use; but not against an expenditure of them, even an extraordinary expenditure.' These expenses were put upon the same ground with the decay of the vessel.⁽⁴⁾

A ship insured for a voyage from New York to Wilmington, in North Carolina, and thence to Dublin, was arrested by an embargo in the course of the voyage, and after a long detention, an abandonment was made, and the expense of wages was claimed in addition to the amount of a total loss. The court said, 'In addition to a total loss the insurer is answerable only

for the necessary expenses incurred in labouring for the safety and recovery of the subject insured. This contract reaches to no other charge, and the detention of the crew was not necessary for that purpose. The wages of the crew, during the detention by embargo, were not covered by a policy on the ship. (1) *M'Bride v. Mar. Ins. Co.* 7 Johns. 431. See also *Penny v. New York Ins. Co.* 3 Caines, 155.

Section 7. Whether Contribution must be claimed in the first instance from the Parties concerned.

It has been decided in Pennsylvania, that a shipper, whose goods are thrown overboard for the general safety, must in the first instance claim a contribution of the other shippers, and the owners of the ship and freight; but if without any fault on the part of the assured he fail to recover a contribution of these parties, he may recover of the insurers the whole value of the goods thrown overboard. (2) But a different opinion has been given in New York, in the case of damage to corn by cutting away the mast. It was held that the assured might recover the whole damage of his insurers in the first instance, and leave them to claim a contribution from the other shippers and the owners of the ship. (3) The assured could not have recovered for the damage to the corn as a particular average, this being one of the memorandum articles.

But in the case of general average for reclaiming a captured vessel and cargo, both belonging to the same owner, it was decided that the assured could not recover the whole amount against the underwriters on the vessel in the first instance, since he would be immediately answerable over to them again for his proportion as owner of the cargo. (4)

Where the contribution is due at a foreign port of delivery, it might, under some circumstances, be lost, unless it were claimed by the assured, or by his agent, the master, at that port. As far as the contribution is lost by such neglect, the insurers, it can hardly be doubted, would be discharged from their liability. (5)

Section 8. Amount of the Contribution.

In case of a sacrifice of a part of the ship or cargo, for the general safety, no contribution is to be made unless the purpose of making the sacrifice is effected; and the contribution is made only by what is finally saved of the ship, cargo, and freight. (6) But if the goods thrown overboard, or put into boats, for the general safety, are saved, and the ship and rest of the cargo are lost, no contribution is to be made. (7) If however the ship escapes the peril, on account of which a jettison is made, and is afterwards wrecked, still, whatever is saved from the wreck must contribute for the jettison. (8)

A distinction is to be observed between a jettison, and expenses incurred for the general concern. Contribution for jettison is

(1) *M'Bride v. Mar. Ins. Co.* 7 Johns. 431. See also *Penny v. New York Ins. Co.* 3 Caines, 155.

(2) *Lapsley v. U.S. Ins. Co.* 4 Bin. 502. And see 1 Emer. 659. c. 12. s. 44; *Marsh. Ins.* 544, 546.

(3) *Magrath v. Church*, 1 Caines, 196.

(4) *Jumel v. Mar. Ins. Co.* 7 Johns. 412, and see *Williams v. Lond. Ass. Co.* 1 M. & S. 318.

(5) 1 Mag. p. 76. s. 63.

(6) Val. tom. 2. 165. p. 280; Emer. tom. 1. p.

216; Code de Com. l. 2. tit. 12. du Jet, a. 228, 233;

1 Mag. 57.

(7) Dig. 14.

2. l. 4 & 5;

Q. Weyts.

s. 19.

(8) Dig. 14.

2. 4; Code de

Com. l. 2. t.

12. du Jet, a.

235; Q.

Weyts. s. 20.

Average for

expenditures

does not de-

pend upon the final safety of the property.

(1) *Infra. c.*
14. s. 9.

made only in case something is finally saved; but actual expenditures in making a port to refit, or claiming captured property, or in repairing damages done to the ship for the general safety, are to be contributed for in general average, though both the ship and cargo are subsequently lost, and nothing of either finally comes to the use of the owner.⁽¹⁾ No reason can be given why such expenditures should be borne by one party rather than another. An exception is, however, made in practice to this rule. If the funds to meet the expenditures are raised by hypothecation upon the security merely of the ship or cargo or both, nothing is considered to be due to the party whose property is hypothecated to raise the funds, unless the property arrives under such circumstances that the bond may be enforced. In case of funds to meet expenditures being raised merely by hypothecation, the claim for contribution for the expenditures, becomes subject to the same conditions as a claim for contribution for jettison; it depends upon the arrival of the property.

One reason for this practice is that the party whose property has been hypothecated, has lost nothing, since the bond of hypothecation has not been enforced. Another reason is, that the lender, in consideration of the marine interest, takes the risk of the arrival of the property to the amount lent, for which all the parties concerned engage to pay him a premium, in case of the arrival of the property, since in that case they must contribute the amount of the marine interest. But, upon these reasons, if a part of the ship or goods hypothecated, is finally saved and goes in part satisfaction of the bond, the owner of what is saved would be entitled to contribution for the amount saved, and thus appropriated towards the discharge of the bond.

Amount of loss by Expenditures.

(2) *Jumel v.*
Mar. Ins. Co.
7 *Johns.* 412.

In regard to disbursements which come into general average, the amount expended is, of course, the amount to be contributed. The loss incurred by raising funds, is a part of the average; as in case of the master's drawing bills at a discount. If it is necessary to hypothecate the ship or cargo to raise funds, the marine interest is included in the contribution, but this charge is not allowed if there are any other means of raising funds.⁽²⁾ Sir William Scott says, 'The first and most obvious fund for raising the money, is the hypothecation of the ship. But the foreign lender may refuse to lend upon the security of the ship, or on that security alone. The master not being able to raise money on that alone, what is he to do? I conceive one of two things—to sell a part of the cargo for the purpose of applying the proceeds to the prosecution of the voyage, or to hypothecate the whole for the same purpose.'⁽³⁾ The same necessity which authorizes the master to hypothecate, imposes upon the parties concerned the obligation of paying the marine interest.⁽⁴⁾

(3) *The Gratitude*, 3
Rob. 240.
(4) See
Reade v.
Com. Ins. Co.
3 *Johns.* 380.

Loss of freight.

As far as the loss of freight is to be made good by general average, the amount lost determines that of contribution. The freight lost is contributed for at its gross amount; but only two thirds or some other proportion of the freight saved, which is

considered to be equivalent to net freight, contributes. The freight lost by a jettison, is a subject of contribution, the statement of the average being so made as to include this loss.(1)

(1) 1 Mag.
285. Cas.
xxiii. No. N.

If the subject of contribution is damage to the ship, the amount of the damage is determined, as in case of particular average, by that of the repairs, deducting a third new for old, where the repairs are actually made; and where no repairs are made, the damage is a subject of estimation. Where the value of the ship is to be contributed, in case of its loss by voluntary stranding, the measure of the loss is not the value at the commencement of the risk, as in case of a total loss under a policy upon the ship, but the value at the time when the ship is run aground. The value of the ship at this or that particular place is not the measure, as it is in regard to goods, but the inquiry is, what it would have been worth to the owner at the time of its being run aground, if he could have had it in security, and free from any impending peril. The rule adopted in one case, in Pennsylvania, was the value of the ship at the commencement of the voyage, deducting one fifth for diminution of value, by wear and tear, and decay.(2) This being the value at which the ship would have contributed, had it been saved, and a general average had been made on some other account; in conformity to a decision in New York,(3) it was held that it should be contributed for at the same value. The reason of adopting this rule was the supposed necessity of some general rule on the subject, but it is a very great objection to it that it would operate very unequally, since the diminution of value would be much greater, as the risk had been of longer continuance. The necessity of a general rule does not seem to be so great as to require the adoption of one that would operate so unequally.

Damage to
the ship.

(2) Gray v.
Wain, 2 Serg.
& Rawle, 229.
(3) Leaven-
worth v. Dala-
field, 1
Caines, 573.

If goods thrown overboard for the general safety, are recovered by the owner before a contribution in general average is made, the amount of the damage done to the goods by the jettison, and the expense of recovering them, is to be contributed for; and not their entire value.(4)

Loss of goods,
or damage to
them.

(4) Beawes,
tit. Salvage,
&c. 2 Val.
212; 1 Mag.
p. 56. s. 53.
(5) Q. Weyts.
de Av. s. 12.
Casar. disc.
46. n. 47;
Les Us & Cou.
de la Mer. p.
21. n. 14.

Where the whole value of the goods is to be contributed, a distinction has been made in some codes, and by some writers, between a case of jettison before, and one after, half of the voyage is performed; making the invoice price the amount to be contributed in the former case, and the price at the port of delivery, in the latter.(5) But no such general distinction is made in England or the United States; the price of the goods contributed for is their value at the time and place in reference to which the other goods contribute; that is, goods contribute, and are contributed for, in general average, at the same rate. This rate will be subsequently considered.

The laws of Oleron provide that, 'if a merchant freights and loads a ship, and despatches her upon a voyage; and that ship enters a port, and is delayed there until her monies are spent; the master may well take and sell part of the freighter's wine or merchandise. And when the said ship comes to her place

Goods sold by
the master to
raise funds.

(1) A. 22. See also Laws. Wisb. a. 35. 68, 69; Cons. del. Mar. c. 106; Ord. d'Anvers a. 19; Code de Com. l. 2. tit. 8. du Jet, a. 109.

(2) The Gratitude, 3 Rob. 240.

(3) A. 43. Jettison of goods, of the value of which the master had no notice.

(4) Q. Weyts. s. 33; Casar. disc. 46. n. 49; Les Us & Cou. de la Mer. 22; Jug. Oler. a. 8. n. 22; Val. tom. 2. p. 202. tit. du Jet, a. 12; Code de Com. l. 2. tit. 12. du Jet, a. 231.

Contributory value in case of expenditures.

(5) Dig. De leg. Rhod. l. 2. s. 2.

(6) Douglas v. Moody, 7 Mass. Rep. 554.

of discharge, the wines, which the master took, ought to be paid for at the same price for which the other wines are sold.'(1)

In respect to selling a part of the cargo for the purpose of applying the proceeds to the prosecution of the voyage, Sir William Scott says, 'The books overflow with authorities. They all admit that he may sell a part; some ancient regulations have attempted to define what part. The general law does not fix any aliquot part; and indeed it is not consistent with good sense to fix a limitation to measure a state of things which is to arise only from necessity. The power of selling cannot extend to *the whole*, because it never can be for the benefit of the cargo that *the whole* should be sold;(2) since the voyage could then be prosecuted only with an *empty* ship.

The authority of the master to sell a part of the cargo, at an intermediate port, in case of necessity, implies an obligation on the part of those interested, and on whose account the sale becomes necessary, to pay for the goods at the price for which they would have sold in the port of discharge. The expense of raising funds falls upon the contributors in this case also, as far as the funds are raised on their account, since, in most instances, they pay for the goods at a higher price than that for which they were sold at the intermediate port.

The laws of Wisbuy provided, that if jettison was made of a box containing gold, precious stones, or other very valuable commodities, and the master had no reason to suppose that such articles were contained in the box, contribution should be made only for the value of the box.(3) A similar doctrine is stated in some of the old writers, who think that only the value of the goods, which the master might reasonably suppose to be contained in the box, should be contributed for.(4) This question does not appear to have come under consideration in England or the United States.

Section 9. In reference to what Time the Contributory Value is Estimated.

The amount of a contribution is assessed upon the different parties, in proportion as they are benefited by the sacrifice, or interested in the expenses contributed for; that is, in the proportion of the value of their several interests.(5) Accordingly in case of expenditures, the value, at the time of incurring them, ought to contribute; this being the proportion in which the several parties are interested. 'It is most reasonable, says Mr. Justice Sewall, to estimate the vessel and cargo at their value in the place and at the time, where and when the expense was incurred.'(6)

A vessel having been detained and subjected to expenses by capture, Mr. Justice Jackson, giving the opinion of the court, said, 'As contribution is claimed as a recompense for services rendered, and not a compensation for property voluntarily sacri-

ficed, the party who performed or paid for these services, was entitled to his recompense, although the ship should have been afterwards totally lost before completing her voyage. The contribution, therefore, must be adjusted according to the value saved at the time when the expense was incurred.⁽¹⁾

(1) *Spafford v. Dodge*, 14 Mass. Rep. 79.

But where security is given only by hypothecation, and the payment of the expenses is thus made to depend upon the event of the voyage, there seems to be a ground of distinction. Where the amount is so secured, independently of the personal responsibility of any of the parties, as it does not, according to usage, appear that any contribution will be due until something is finally saved, this is a reason for apportioning the contribution on what may be finally saved, as in case of jettison. This is, however, a question of some doubt, and one that does not appear to have been particularly considered. But where the subject of contribution consists of disbursements, such as port charges, and expenses on account of legal proceedings in cases of capture, for which the ship, freight, and cargo, are liable to contribute; since the parties become personally liable to pay those expenses as soon as they are incurred, it seems to follow that they are liable to contribute in the proportion of the value of their interests at that time. And it would follow, that where the average was occasioned partly by expenses, and partly by the sacrifice of a part for the general safety, that the apportionment should be different for these respective parts, in case the entire ship and cargo do not arrive at a port of discharge, or in case of a great change in the relative value of the different interests subsequently to the time of incurring the expenses.

Where the captain defrays the expenses of putting into a port of necessity, by selling a part of the cargo, the question occurs, whether the average shall be considered to be due at the place where the expenses are incurred, or at the port of destination; or in other words, whether, if the ship and the rest of the cargo are subsequently lost, the owner of the goods so sold shall be paid their value. According to the laws of Wisbuy, the goods were to be paid for in such case.⁽²⁾ There is no question of this, unless the ship and cargo are considered in effect to be hypothecated for the value of these goods, and the right of the owner of them to be paid their value at the port of destination, is considered to be equivalent to marine interest. But the rule of the law of Wisbuy seems to be preferable, since the owner of the goods so sold, loses the claim which he might otherwise have against his underwriters, in case of the goods being lost with the rest of the cargo and the ship. But in case of the subsequent loss of the ship and cargo, he ought to be paid for the goods, only at their value in the intermediate port where they were sold.

Whether goods sold to pay the average expenses, are to be paid for, if the ship be subsequently lost.

(2) A. 68.

It is a rule, that a general average for jettison is to be apportioned at the port of delivery, whether it is the port of destination or any other.⁽³⁾ And the several interests contribute according to their value at the time to which the apportionment relates, or when the contribution becomes absolutely due.

(3) Dig. de leg. Rhod. l. 2. s. 4; 1. Mag. 307. Cas. xxv. No. O.

General average for jettison is adjusted at the port of delivery.

Section 10. Contributory value of the Ship.

Since the owners of the vessel are constantly incurring expenses for the purpose of earning freight, they are benefited by a jettison only as far as the value of both the ship and freight, at the time of the apportionment, exceeds the amount of those expenditures. Different rules have been adopted for determining the just value for which the owners of the vessel ought to contribute. Some ordinances and codes gave the master the choice of contributing on the full value of the freight or of the vessel; (1) others require him to contribute for half of the value of each; (2) and others provide that the ship shall contribute on its entire value at the time to which the apportionment relates. (3) And this is the more convenient and just rule, since the expense of navigating the ship ought rather to be considered a charge upon the freight, and ought to be deducted from that interest on account of which it is incurred.

Accordingly in England and the United States the ship contributes on its full value at the time to which the apportionment relates. (4) In determining this value in adjusting an average of the expenses occasioned by capture, the court in New York deducted one fifth from the value at the commencement of the voyage, (5) and the same rule has been adopted in Pennsylvania. (6) But no such rule has been adopted in Massachusetts, (7) and the expediency of any such rule is very questionable, since it is arbitrary, and must necessarily be very unequal in its operation. It seems that this rule is not applied in New York, in cases where the true value can be ascertained. In a case of the actual sale of the ship, the contributory interest was held to be the amount for which she was sold. (8)

The amount for which the ship might be sold at the place where the contribution becomes due, is not, in all cases, the contributory value.

(7) *Douglas v. Moody*, 9 Mass. Rep. 548; *Spafford v. Dodge*, 14 Mass. R. 66.
(8) *Bell v. Smith*, 2 Johns. 98.
(9) *Ut Supr.*

(10) *Ib.*

The value of the ship, as a contributory interest, ought not, however, as Mr. Stevens justly says, (9) to be determined in all cases by the price for which she might be sold at the place where she happens to be, at the time when the contribution becomes due; since she might, according to the demand for shipping there, and according to the place where she was built, bear a very low, or very high price. These are adventitious circumstances, which ought not to affect the adjustment of the loss. The question is, for what price could the owner afford to sell the ship at the time; and that price is the true amount of this contributory interest. It is not more difficult to determine this amount, than to fix that of the insurable interest in a ship insured in an open policy, which is not unfrequently done.

This rule excludes from the amount to be contributed for, the diminution of the value of the ship by extraordinary sea-damage, and other casualties, which constitute objects of indemnity under a policy of the usual form upon the ship, and there is no question as to the propriety of making this deduction; (10) since the ship, to the extent of such damage, does not arrive safe; or, a part of the ship to this amount is not finally saved; and contribution is made only by what is finally saved.

The same principle applies to a subsequent general average loss. The part of the ship's value saved by the first jettison, or other occasion of average, is the remainder, after deducting the contribution for the subsequent general average losses. The rule is general, and applies to all interests and all losses, in determining the amount of ship, freight, or cargo, that must contribute to any gross average, which depends upon the final safety of the property; the amount of all subsequent general and particular averages on the interest is to be deducted, since they are either so much abstracted from the subject, and so not finally saved, or they are so much paid, and constitute a part of the expenses of saving the property. Upon the same principle, if the ship survives the peril on account of which a jettison is made, and is afterwards wrecked, but a part of its materials are saved; only the value of what is saved, after deducting the expenses of salvage, contributes for the jettison.(1)

(1) *Dodge v. Un. Ins. Co.*
17 Mass. Rep. 478.

The Roman law excepted from contribution the provisions and articles intended to be consumed on board.(2) But articles of this kind remaining on board at the time of the apportionment, of those which were on board at the time of incurring the loss, constitute a part of the value of the ship saved, and so are a part of the contributory interest of the ship. In regard to stores and provisions consumed before the loss was incurred, they plainly do not form any part of the contributory interest.

Provisions consumed, and wear and tear, and decay of the ship.

(2) *Dig. de leg. Rhod. l. 2. s. 2.* and see *Code de Com. l. 2. tit. 12. du Jet, a.* 230.

The stores and provisions consumed, and the damage to the ship by wear and tear, and its deterioration by decay, between the time of the jettison and that of the adjustment, ought to contribute only as far as they may be considered to be finally saved, and their being so considered, depends upon the vessel's earning freight. If freight is eventually earned, the part abstracted from the value of the vessel, in the course of navigation, is saved, and comes to the use of the owner in the form of freight. This part of the value of the vessel ought, therefore, to be had in consideration, in fixing the amount upon which freight is to contribute.

It is intimated in one instance that in case the ship is at a foreign port, when the contribution accrues, the expense of bringing her home is to be deducted in estimating her contributory value.(3) But this is supposing her to come home empty, which does not seem to be a necessary supposition.

(3) *Gray v. Waln, 2 Serg. & Rawle,* 238.

Where the average is occasioned by cutting away a mast, or sacrificing any part of the ship, the amount to be contributed for such sacrifice, is to be added to the value of the ship at the place of adjustment, in fixing the amount for which the ship is to contribute. It is a rule that where a contribution is made on account of the sacrifice of a part of the general interest, the part contributed for constitutes a part of the contributory interest; since otherwise the party whose property is sacrificed would be fully indemnified, while the other parties would pay away in contribution, a part of the value of what had been saved.

The damage contributed is a part of the contributory value.

Section 11. Contributory Value of Freight.

The freight pending at the time of the loss, and finally earned contributes.

(1) *Williams v. Lond. Ass. Co.* 1 M. & S. 318; *Maggrath v.*

Church, 1 Caines, 196.

(2) *The Dorothy*, 6 Rob. 88. See also

The Progress, 1 Edw. 210.

(3) *Dunham v. Com. Ins. Co.* 11 Johns. 315.

(4) *Strong v. N. Y. Fire. Ins. Co.* 11 Johns. 323.

(5) *P. I. c. 1. s. 2. a. 2 & 3.*

(6) *Supr.* 51.

(7) *Maggrath v. Church*, 1 Caines, 196.

(8) *P. I. c. 1. s. 2. a. 3.*

(9) *Supr.* p. 356. s. 9.

The freight pending at the time of the jettison or other sacrifice contributes for the loss on the amount eventually saved.⁽¹⁾ In a case of salvage, Sir William Scott said, 'Whether salvage is due on the freight will depend on the fact, whether freight was in the course of being earned. If a commencement has taken place, and the voyage is afterwards accomplished, the freight is included in the valuation of the property on which salvage is given.'⁽²⁾ The same principle applies to contribution in general average. If the cargo has been delivered before a loss is incurred, and the freight has thus become absolutely due, it does not contribute;⁽³⁾ and if a part of the cargo has been delivered before the loss, only the freight of what goods remain on board contributes.⁽⁴⁾ Upon the principle that only the freight pending, and in the process of being earned, contributes, Mr. Stevens says, that if the freight is advanced, and not to be recovered back by the shipper, though the voyage should be defeated by perils of the seas, or any inevitable accident, the freight, as such, does not contribute, since it was not in danger of being lost by any peril on account of which a jettison or other sacrifice is made.⁽⁵⁾

The circumstances which give a commencement to the interest in freight, and the duration of this interest, have been already considered;⁽⁶⁾ and if a general average loss occurs while this interest is at risk, it contributes, as far as it is eventually earned. If only freight *pro rata itineris* is earned, that only contributes.⁽⁷⁾ Mr. Stevens says, 'On a ship chartered for the voyage, and the average being settled at the port of loading, it is the custom in Lloyd's to make the freight contribute.'⁽⁸⁾ But it does not appear upon what principle freight, *as such*, can contribute at the port of departure. If expenditures are incurred on account of the ship, cargo, and freight, for which the owners of these interests are personally liable in the proportion of the amount of the interests respectively, these expenses may be apportioned upon the parties as a general average at the port of departure, or at any intermediate port, while the voyage is still in progress, and while it does not appear how much, or whether any thing, will be eventually saved. But this, as we have seen,⁽⁹⁾ is a different case from that of a sacrifice of a part for the general safety, which is to be contributed for by what is finally saved; and it is very questionable whether any part of the freight can be considered as finally saved, at the port of departure.^(a)

(a) See 1 Mag. 186. Cas. xii. No. 1.; *Griswold v. N. York Ins. Co.* 1 Johns. 205. 3 Johns. 321. Lord Mansfield's rule as to *pro rata* freight, in *Luke v. Lyde*, 2 Burr. 828, might make freight due at the port of departure, but that rule has been shown to be wrong, and cannot be said to be in force. Abb. on Mer. Ships, 306 n; Jacobson's Sea-Laws, 268 n.

As contribution is made by that which is saved of what might have been lost by the peril which was the occasion of a sacrifice, and as the owner of any interest would have lost by the peril only the amount finally saved after the deduction of expenses, the amount of the contributory interest is the value of the interest, after deducting these expenses. Freight is earned by the wear and tear and natural decay of the ship; the wages and provisions of the crew; and the port charges, pilotage, and other expenses attending navigation. But only a part of these should be allowed in estimating the amount of this contributory interest. If freight is not earned, of course there can be no question in regard to its contributing. If it is earned, the deterioration of the ship by decay, and wear and tear, and the consumption of provisions and stores, which were on board at the time of the jettison, are the appropriation of so much of what was the value of the ship at that time to its intended use. Such part of the ship's value is finally saved, if at all, in the form of freight; and unless it is so saved, it ought not to contribute, since only what is saved contributes; and it ought not to be contributed for, since it was not a part of the voluntary sacrifice. It follows that no deduction ought to be made on these accounts in fixing the contributory amount of freight.

Expenses subsequent to the jettison, are to be deducted.

But the wages of the men for the voyage, the expense of provisions and stores put on board and consumed after the jettison, and the port charges, pilotage, and in general all the disbursements made by the owner after the jettison, and as the means of earning the freight, are to be deducted from the gross amount, the excess being the amount actually saved out of what was at risk when the jettison was made, and accordingly such excess is the true amount of this contributory interest. Mr. Stevens says, 'There may be some doubt whether the master's wages should be deducted;' (1) but there appears to be no satisfactory reason for this distinction. The circumstance that the master may insure his wages, although the men are not permitted to insure theirs, seems to be of no importance in regard to contribution. (a)

(1) P. I. c. 1. s. 2. a. 3.

Magens says, 'Only so much of the seamen's wages ought to be deducted from the freight, as may be due from the time of beginning to load; for if any remained due on account of their outward-bound voyage, it was a debt owing to them, and must have been paid if the ship had been lost in coming home.' (2)

(2) Vol. 1. p. 72. s. 58.

(a) Though the seamen are interested in a jettison, since they are not entitled to wages unless the voyage is performed, yet their wages are not brought into contribution. Cons. del mar. c. 281. 293. But the mariners have been held liable to contribute for the ransom of the ship and crew. 1 Emer. 642. c. 12. s. 42; Valin, tit. des loyers, art. 20. who cites Dig. de leg. Rhod. l. 2. s. 3. Si navis a piratis redempta sit, &c. Mr. Abbott seems to consider the rule to be in force in England, p. 346. P. I. c. 8. s. 14. But it can be applicable there, or in the United States, if at all, so only to a case of ransom from pirates.

But it is evident, that if the freight for the outward and home-ward-bound voyages was pending, the wages of both voyages ought to be deducted. Freight is said to be the mother of wages, that is, wages are due only in case of freight being earned. Therefore the whole of the wages accruing during the time of earning the pending freight, are a necessary deduction from its gross amount in estimating its real value; and at whatever stage of the voyage a jettison is made, this deduction is the same.

Mr. Stevens says, 'Where the seamen were not only paid, but hired by the month also, the case might admit of discussion; (1) that is, if the wages did not depend upon earning freight, but were payable absolutely at the end of each month, the deduction from gross freight on this account might be different. If the men are so hired, and the ship is freighted *for the voyage*, the wages paid before the jettison, are upon precisely the same footing as the provisions and stores consumed before that time, in the ordinary mode of hiring the men, as well as freighting the ship, *for the voyage*. That is, in estimating the amount of the contributory interest of freight in such case, no deduction ought to be made on account of wages absolutely due before the jettison or other occasion of contribution.

Where a jettison or other sacrifice is made for the common safety, and the ship is afterwards wrecked, but the cargo saved, and the owners, to entitle themselves to freight, are obliged to hire another ship to carry on the cargo to the port of destination, in determining the amount of the contributory interest in freight, the expense of hiring another ship is deducted. (2) The excess of the freight for the entire voyage, over the amount paid to the substituted ship, is the gross amount of freight saved; from which the deductions above-mentioned must be made, in determining the contributory value. In respect to the contribution, this is precisely the case of only a *pro rata* freight (3) being earned, in which case, as in all others, the contributory value is found by deducting the expenses of earning the freight from the gross amount earned.

All contributions to general average, and other expenditures incurred on account of the freight, subsequently to the jettison, are also to be deducted. Partial losses on freight abstract from it a certain part, and therefore lessen the amount earned, and thus diminish the amount of the contributory interest. Accordingly, in case of a loss of a part of the cargo, whereby the ship fails of earning a part of the freight, the contributory interest is diminished. But as the freight of goods thrown overboard in jettison is allowed to the port of delivery where the apportionment is made, this part of the freight is always included in finding the amount on which this interest contributes.

It accordingly appears, that to determine the true amount for which freight strictly ought to contribute, in any particular case, a variety of circumstances must be considered. The calculation does not however seem to be attended with any very great difficulty, since the facts upon which it must proceed may gene-

(1) P. I. c. 1.
s. 2. a. 3.

(2) Dodge v.
Un. Ins. Co.
17 Mass. Rep.
478.

(3) See Mag-
grath v.
Church, 1
Caines, 196.

rally be pretty easily and satisfactorily ascertained at the time of the apportionment.

Mr. Stevens makes no mention of any practice at Lloyd's of deducting any certain proportion of the gross freight earned, in fixing the contributory interest. But some ordinances provide,⁽¹⁾ and the custom is in most places, that freight shall contribute on a certain part of the gross amount earned. It is customary in Boston and Baltimore to estimate freight, in the apportionment of general average, at two thirds of the gross amount earned. This rule is said to be most generally adopted in the United States. But in New York the freight contributes upon one half of the amount earned.⁽²⁾

In regard to average for expenditures occasioned by detention in case of capture, where the property was released, it was decided in one case, in Massachusetts, that the freight did not contribute.⁽³⁾ But this decision has been overruled and the freight held to be liable to contribute;⁽⁴⁾ and there seems to be no distinction between this case and others in regard to the mode of estimating the amount on which it contributes, since the whole freight, pending at the time, is considered to be saved as to the purpose of such a contribution, and it therefore contributes on its entire net value, that is, upon two thirds or one half of the gross amount, according to the usage of the place.

(1) Supr.
(2) Leavenworth v. Delaware, 1 Caines, 572; Heyliger v. N. Y. Firem. Ins. Co. 11 Johns. 85.

Amount on which freight contributes for expenses in detention by capture.

(3) Douglas v. Moody, 9 Mass. Rep. 548.

(4) Spafford v. Dodge, 14 Mass. Rep. 66.

Section 12. What Goods Contribute and at what Value.

As much of the cargo on board at the time of making a jettison or other sacrifice for the general safety, as finally arrives at the port of delivery, or comes to the use of the owner, contributes in general average.

Magens says, 'What pays no freight, pays no average'.⁽⁵⁾ But Mr. Stevens says, 'It would be very unjust that the master, or any other person, who had goods on board, should not contribute because he pays no freight.'⁽⁶⁾ Lord Ellenborough considers this contributory interest to consist of 'the wares or cargo for sale, laden on board';⁽⁷⁾ and Mr. Abbott says, 'The articles to contribute, are all merchandise, conveyed in the ship for the purpose of traffic, whether belonging to merchants, to passengers, to the owner, or to the master.'⁽⁸⁾ But it does not appear upon what principle the circumstance of the goods being intended for sale, is of any importance in respect to their being liable to contribute.

The Roman law made all the goods on board, including those belonging to passengers, and also their baggage, wearing apparel, rings, and other ornaments, worn upon the person, liable to contribute.⁽⁹⁾ It seems that Magens, in saying that 'What pays no freight pays no average,' means to exclude from contribution only the wearing apparel and ornaments belonging to the person, since he says, 'If a passenger should conceal in his trunk, or about his body, any such considerable sum of money

Whether only the goods which pay freight contribute.

(5) Vol. 1. p. 62. s. 58.

(6) P. I. c. 1.

s. 2. a. 1.

(7) 8 East, 375.

(8) P. 344.

See also Marsh. 543.

(9) Dig. de leg. Rhod. l.

2. s. 2. See

also Les Us

& Cout. de la

Mer, p. 23. n.

26; Molloy,

b. 2. c. 6.

s. 14.

or jewels, as would not be suffered without paying freight, he must contribute to jettison.'(1)

**Passengers
baggage.**

(1) Vol. 1. p. 63. s. 55.

See *Les Us & Cout. de la Mer*, Jug. Oler. a. 8. n. 24.

(2) Tom. 1. p. 645. c. 12. s. 42.

(3) Tit. du Jet, a. 11. n.

(4) Code de Com. l. 2. tit. 12. du Jet, a. 232.

(5) 1 Emer. 643.

(6) *Peters v. Milligan*, Park, 211; *Millar*, 244; *Q. Weyt*. s. 13.

(7) Tit. Contribution, n. 1.

Emerigon cites the different ordinances and other authorities upon this subject, and concludes, that of right, and upon general principles, every thing belonging to the passengers, even to their wearing apparel, is liable to contribute. He adds, however, that he has never known an instance of contribution on account of the clothes or jewels worn by a passenger, his trunks, or baggage, or the money in his purse. Yet he thinks that a court would be bound to allow such a claim; for, says he, 'The trunks of a passenger thrown overboard for the general safety, must be contributed for; and why, if they are preserved, should they be exempted from contribution?'(2)

Valin(3) considers the wearing apparel, jewels, rings, ornaments, and in general whatever a passenger habitually wears, uses or carries about his person, during the voyage, including his change of linen, to be exempted from contribution by the concurrent authority of the ordinances and writers. And this seems to be the general practice. But in regard to any other part of his baggage, the exemption of it, in any case, seems rather to be a matter of favour than of right. If it is of sufficient value to be worth bringing into contribution, no reason has been given why it should not constitute a part of the contributory interest. The reason for excepting wearing apparel, and the like, seems to be, that the persons of those on board are not brought into contribution, and the exception extends to things which are merely accessory to the person.

**Goods on
deck, goods of
the mariners,
and goods
jettied.**

**Precious
metals, &c.**

(8) *Les Us & Cout. de la Mer*, p. 20. Jug. Oler. c. 8. n. 8.

(9) Tom. 2. p. 184. tit. des av. a. 11. n.

(10) *Peters v. Milligan*, Park, 211.

(11) Dig. de leg. Rhod. l. 2. s. 2.

**Goods of
whatever
kind contri-
bute upon
their value.**

Goods, carried on deck, contribute in general average, though if thrown overboard in jettison, they are not contributed for;(4) and so also do goods carried by the mariners in their privilege,(5) and so do the goods thrown overboard.

Gold, silver, jewels, and precious stones, and other articles of any value, of however small bulk, contribute to general average;(6) and Weskett even seems to think that bank-notes ought to constitute a part of the amount upon which the average is assessed;(7) but as these are not so properly, actual property to the amount promised to be paid, as the evidence of demands, which evidence may be supplied by other, in case of their being lost, if sufficient precautions are taken by the holder to prove what particular notes they were; this circumstance sufficiently distinguishes them from specie or other property, which is usually made to contribute.

It was formerly a maxim that goods of the king, that is, of the government, should not contribute to general average.(8) But Valin thinks there is no reason for this exception.(9)

Goods contribute according to their value, however small their bulk may be in proportion to their value,(10) for a first principle of general average is an apportionment of the contribution upon the value saved, this being the proportion in which the parties are benefited.(11)

Goods, as well as ship and freight, contribute upon their value to the owner at the time to which the apportionment relates;

and this value necessarily depends upon the place where they are considered to be finally saved, since that is their value at the time to which the apportionment relates. If they are sold at such place, the amount of the proceeds is the basis on which that of their contributory value is calculated; but if they are not sold, the inquiry is, of what value they are at such place to the proprietor, after the deduction of all charges. If the same kind of goods bears a price current at the place in question, that is the basis of the calculation of the contributory interest; but if there is no price current, the value is a subject of estimation, or they contribute upon the invoice prices. If the average is adjusted at the port of destination of the goods, the market price is usually the basis of the calculation of the interest, but if at any other port, as it must be in case of the cargo being delivered at different ports successively, the invoice price is often considered to be the contributory value.

Goods contribute for their value at the time to which the apportionment relates.

In case of contribution for expenditures, the amount contributed by each party is the same, whether the whole contributory interest is put at a high or low rate, provided it is all put at the same rate. But in this case it may be of importance as to the amount to be recovered of the insurers, whether the valuation is high or low.

In case of jettison, a high valuation of the whole contributory interest evidently operates in favour of the party to whom the contribution is due, whatever part of the contribution may be assessed upon his own property, and a low valuation operates against him; and *vice versa* as to the other parties. The contribution ought, therefore, to be apportioned upon the true value.

The goods contribute for the value saved, of what was at risk at the time of the jettison. All subsequent averages, whether particular or general, and all expenses of salvage, are deductions from the contributory interest, since they abstract something of the subject, or constitute charges upon it, and accordingly so much of the value of the goods as these amount to, is not finally saved, and therefore does not contribute.⁽¹⁾ If the adjustment is made upon the value at the port of delivery, the apportionment is made upon the net proceeds, after deducting the freight that becomes due in consequence of delivering the goods, also the duties, wharfage, storage, commissions paid on the sales, and all other expenses; since the value received by the owner, or that which is eventually saved by coming to his use, is the true amount of his contributory interest. The premium of insurance is not deducted, since that must have been paid though the goods had not arrived.

Freight and other charges upon the goods are deducted.

(1) Poth. Cont. de Louage, n. 132; Casar. disc. 46. n. 11; 17 Mass. Rep. 471.

Where the advance upon the invoice price of the goods is just equal to the freight and charges, it is the same thing whether the goods contribute upon that value, or upon the net proceeds. Since in many instances the result of each mode of computation is very nearly the same, and also on account of the facility of adjustment, the apportionment is often made upon the invoice value. Either party may, however, require an apportionment to be made according to the value at the time and place to

which it relates; the invoice value being assumed only for convenience.

(1) *Douglas v. Moody*, 9 Mass. Rep. 548.

Where an adjustment of an average for expenditures or compromise in case of capture, is made on the value at the port where the detention takes place, a question occurs whether the freight is to be deducted in estimating the value of the goods.⁽¹⁾ The inquiry in such case should be, what the owner of the goods would lose by their condemnation. And it is plain that he would lose the amount for which they could be sold at such port, deducting expenses, and the freight to that port; or he would lose the proceeds at the port of destination, deducting the expenses and entire freight for the whole voyage. But this last mode of computing the value is liable to one objection, since if the goods subsequently arrive at the port of destination, the market may have changed; and as the goods may never arrive there, it involves a great inconvenience in computing the value. The real value is the proceeds at the time and place in reference to which the average is adjusted, which is the net proceeds at that place, or what would be the net proceeds in case of a sale, after deducting expenses and freight *to that place*. This mode of adjustment is conformable to the principles upon which general averages are settled in other instances; it is always practicable; is the most convenient; and effects an apportionment upon the real value. It regulates the contribution by the market price at the time and place to which the adjustment has reference, and adjustments are generally made in pursuance of this principle.

Whether the premium is to be included where the goods contribute upon the invoice value.

In case of adjustment upon the invoice value, a question occurs whether the premium of insurance is to be included. It seems that no general rule can be laid down in this respect, since if the premium is to be considered a part of the cost of the goods at the port of shipment, (which indeed it hardly can be,) the other parties to the contribution have no concern with the actual cost of the goods, which may have been purchased at a very high or low price, and this is the owner's gain or loss, by which the other parties ought not to suffer, or be benefited. They are strangers to the invoice; their rights depend on the actual value. Since the first cost of the goods is adopted as the contributory amount, for convenience, and by implicit consent, the including or excluding the premium, rests upon the same grounds. There does not appear to be any established custom in this respect, but it seems to be the more prevalent practice to include the premium.

Section 13. *Liability of Insurers to Pay Contributions.*

As far as a general average is occasioned by perils insured against, the insurers are liable for it to the amount insured. But since the value of the ship, as between the parties to a policy, is its actual or agreed value at the commencement of the risk or port of departure, and that of the goods is the actual or

agreed value at the time of shipment, it is evident that the insurers cannot be affected by their value as contributory interests in general average, since the respective values in the two cases have reference to different times and places. And though the value of freight is less liable to vary in the course of the voyage, yet the insurers of this interest are not bound by the estimation which determines its amount in contribution.(1)

Mr. Justice Sewall said, 'The insurer is liable in the proportion which the sum insured bears to the actual value,'(2) at the time in reference to which the apportionment is made. But he was speaking of a case of the contributory value exceeding the value in the policy, for the proposition is not correct where it is less. There is no difference, in this respect, between a valued and open policy, for though the whole amount at which the interest is valued in the policy, is covered, yet the parties have agreed that, as between them, the value shall be of a certain amount, and accordingly the insurer ought not to be liable to refund a contribution made upon a greater amount. This is not setting aside the valuation, but adhering to it.

If the value of the property, as between the parties to the policy, is 1000 dollars, and half of that amount is covered by the policy; and the same property contributes to general average on the amount of 1500 dollars, the insurer is liable to refund 33 $\frac{1}{3}$ per cent only of the contribution, though 50 per cent of the value of the property, as between the parties to the policy, is insured. But if the property contribute on 500 dollars, the insurer is liable to refund half of the contribution, since this indemnifies the assured on the amount covered, and he can ask no more. Whatever is paid in contribution, by the excess of the contributory value over the value in the policy, is paid by the assured, but for whatever is paid on a contributory value not exceeding the value in the policy, the assured is indemnified to the amount insured.(3)

It has been made a question, whether the insurers are bound by an adjustment of a general average, made in a foreign port. Two reasons have been given why they should be bound by such an adjustment; firstly, the master is obliged to adjust the average at a foreign port of delivery, and since the insurers have the advantage of its being adjusted more favourably to themselves than it would have been in the place where the policy is made, they ought to be subject to the risk of its being adjusted more unfavourably; secondly, where the adjustment is made under an order of court; the decree of a court, on a subject of which it properly has jurisdiction, ought to be conclusive upon the parties. Insurers accordingly, in some instances, agree to refund contributions legally made in a foreign port.(4) And it is the more general practice to settle losses in conformity to adjustments made in a foreign port of delivery, according to the usages and laws of such port, as far as the occasion of the contribution is a peril insured against.

A general average was adjusted at Pisa, under the decree of the court there, in which the estimate of the ship and freight

(1) 1 Mag. 167. Cas. ix. No. 1.; 2 Mag. 339. No. 1286. n.

The insurers are liable to refund contributions only on the part of the value insured.

(2) Clark v. Unit. M. & F. Ins. Co. 7 Mass. Rep. 365.

(3) 1 Mag. 245. Cas. xix.

Adjustment in a foreign port.

(4) Rules of the Petapasco Ins. Co. Balt.

was different from what it would have been in England, and the wages and provisions were included, which, according to the decisions of the English courts, constitute no part of the average. In an action brought upon a policy on the cargo, Mr. Justice Buller said, 'I do not like these foreign settlements of average, which make the underwriters liable for more than the standard English law.' But he told the jury, if they were satisfied that it had been the usage to settle according to the foreign adjustment, the usage 'ought not to be shaken.'⁽¹⁾

(1) *Newman v. Cazalet*, Park, 630. See *Walpole v. Ewer*, Park, 629.

In respect to an average adjusted at Lisbon, in which wages and provisions were included, contrary to the practice in England, Lord Ellenborough, giving the opinion of the court, said, 'This contract must be governed, in point of construction, by the laws of England, unless the parties are to be understood as having contracted on the foot of some other known general usage among merchants, and shown to have obtained in the country where, by the terms of the contract, the adventure is to terminate, and where the average would come to be demandable.'⁽²⁾ And no such usage was considered by the court to have been proved in this case.

(2) *Power v. Whitmore*, 4 M. & S. 141.

Insurance being made in New York, on pipe staves, 'on deck and in the hold,' it became necessary, in the course of the voyage, to make jettison of the staves carried upon deck; and arbitrators at Lisbon, the port of delivery, determined, that according to the laws and usages there, the staves thrown overboard from the deck, should be brought into the average. The court said, 'the owners of the cargo under cover, ought not to contribute to the jettison of the goods on deck. It was decided differently at Lisbon, the port of destination, and the law there is stated to be otherwise, but the parties to this contract must be considered as having in view the laws of this state.'⁽³⁾

(3) *Lenox v. Unit. Ins. Co.* 3 Johns. Cas. 178.

Insurance was made in the same state upon rice, flour, and pease, on a voyage from Philadelphia to Lisbon. After the delivery of a part of the cargo at Lisbon, it became necessary, during a storm, to cut away the greater part of the vessel's rigging and spars, on which account an average was adjusted there, and apportioned upon the ship, the part of the cargo remaining on board, and upon the freight of that part. According to the estimate of the contributory interest at Lisbon, the average was about 10½ per cent, but in an apportionment made according to the rule adopted by the court in New York,⁽⁴⁾ the contribution would have been a little over 13 per cent. Mr. Justice Livingston, giving the opinion of the court, said, 'The general average once being made, and the amount of contribution between the owners of the ship, freight, and cargo, ascertained; it appears, at least, nothing appears to the contrary, that the underwriters had been held liable for such amount. There is no principle more firmly established than that they are bound to return the money which the assured has been obliged to advance, in consequence of any peril within the policy, provided it be fairly and honestly paid, and does not exceed the amount of the subscription.'⁽⁵⁾

(4) 1 *Caines*, 573.

(5) *Strong v. N. Y. Firem. Ins. Co.* 11 Johns. 323.

These opinions shew the difficulty of the question; without, however, seeming to present any principle upon which it may be satisfactorily settled. As far as custom is an authority, it settles one point; since it appears to be the general practice to consider the apportionment of the average among the several interests to be equally binding, wherever the adjustment is made. But as far as the amount, assessed upon the property insured by such an apportionment, is made up of losses or charges, which are not the subjects of contribution at the place where the policy is made, some insurers, at least, consider themselves not to be liable to refund to the assured the contribution. They would not, for example, consider themselves liable to indemnify the assured on goods against his contribution for the expenses of detention by an embargo, under an adjustment made in a French port.

CHAPTER XVI.

PARTICULAR AVERAGE, OR PARTIAL LOSS.

Section 1. On the Ship.

A PARTICULAR AVERAGE is a loss borne wholly by the party upon whose property it takes place, and is so called in distinction from a general average, for which different parties contribute. Particular average defined. A particular average is also called a *partial loss*, whereby the insurers are liable to pay for damage happening to the thing insured, or expense incurred exclusively on its account, and occasioned by the perils insured against, in distinction from a total loss, whereby the insurer becomes liable to pay the entire value at which the subject is insured, as far as it is covered by the policy; not as an indemnity for expenses or deterioration in value, but as its price, and as a purchase of the interest.^(a)

It has already been considered for what losses, or for what effects of the perils insured against, the underwriters are answerable.⁽²⁾ Of these losses, those which do not belong to general average, as above described, are, of course, particular average. (2) Supr. c. 13. In this description of losses are usually included the

(a) A question has been made as to the propriety of the above use of the word *average*. Park, 160; Stevens, P. I. c. 2. p. 73. But it seems to be a sufficient reason for using the term in the above sense, that it has been so used ever since insurance came into practice; that its meaning is definite; and that this mode of expression is often very convenient.

(1) Code de
Com. des Av.
l. 2. t. 11. a.
218; Buller v.
Fisher, 3 Esp.
60. Marsh.
Ins. B. l. c.
12. s. 2.
(2) Supr. 337.

the casual splitting of sails, parting of cables, springing of masts, loss of boats, breaking of the upperworks or any part of the ship, damage by stranding, damage by lightning, or by accidental fire, loss by plunder while the property is for a time in the hands of captors or pirates, damage by running foul of other ships, or being run foul of, (1) and according to a case before cited, (2) the damage sustained by the ship in an engagement with an enemy. All casual and inevitable damage and loss, as distinguished from that which is purposely incurred, is particular average, unless it amount to a total loss. These losses when they are occasioned directly by the perils insured against, and without any fault of the assured or his agents, are to be paid by the underwriter on the subject insured.

Wages and
provisions
during delay
to repair.

The expense of wages and provisions of the crew during detention, has been considered not to be a part of a particular average on the ship. A vessel on a voyage from New York to Liverpool, having received considerable sea-damage, afterwards, on the 31st October, encountered a violent storm, which she attempted to ride out at anchor, but it became necessary to cut her cables and run her ashore at Hoylake. On being lightened she was got off, and brought up to Liverpool on the 7th of November. All the cargo was discharged by the 31st of December. The vessel could not have its turn to be put into the dry docks, for repairs, before the 20th of February, and her repairs were not completed until the 24th of March. It was contended that the underwriters on the vessel should pay, not only for the repairs, but also for the wages and provisions of the seamen, and other expenses, during the detention. Chief Justice Thompson, giving the opinion of the court, said, 'The expenses for wages and provisions cannot be brought into general average. They were not incurred for the benefit of cargo or freight. The cargo had been delivered, and the freight was earned, before the expenses were incurred. And if these expenses cannot be brought into general average, I do not see how the underwriters on the ship are to be made liable for them.' (3) And it was held in Connecticut that this expense was not recoverable of the insurers on the ship, though the men were employed during the detention in making the repairs. (4)

(3) Dunham
v. Com. Ins.
Co. 11 Johns.
315.

(4) Sage v.
Middletown
Ins. Co. 1
Conn. Rep.
239.

Wages during
detention by
embargo.

Deduction of
one third,
new for old.

(5) M'Bride
v. Mar. Ins.
Co. 7 Johns.
431.

It has been held also, that 'the wages of the crew during detention by embargo, are not covered by a policy on the ship.' (5)

In case of a partial loss on the ship, the underwriters are liable to pay for the damage sustained, the amount of which is calculated upon the expense of repairs, in case of the owner's choosing to repair the ship, otherwise the amount of the damage is a subject of estimation. It is considered that where old timbers, or other materials, are replaced by new, the vessel, when repaired, is better than she was before the damage was sustained; and accordingly it is held that the assured must himself pay a part of the expense of the repairs in proportion as the ship is made better.

Mr. Justice Story says, if the difference between the value of the vessel when repaired, and her value before the damage,

'were to be ascertained in each particular case, by actual inspection and estimates, there would be no end of controversies; and therefore general usage, which the law follows as founded in public convenience, has applied a certain rule to all cases. It is true here, as was observed by Lord Mansfield upon another occasion, that it is of less importance how the rule is settled, than that it should be settled.'⁽¹⁾

(1) *Peele v. Merchants' Ins. Co. C. C. U. S. Mass. Oct. 1822. 2 Mason's Rep.*

Whatever general rule is adopted, it will evidently operate with some inequality, as a new ship may not be so good after being repaired, as she was before sustaining any damage; whereas an old one may be better. The rule is, that the assured shall pay one third part of the expense of labour and materials requisite to make the repairs, and shall recover only two thirds of the underwriters; it being considered that, in general, the ship is better by the amount of one third of the expense of the repairs. This allowance is called the deduction of one third *new for old*.

Mr. Stevens says, 'It is customary to deduct one third from the new materials and labour, unless the ship be perfectly new, i. e. on her first voyage, or the materials sacrificed be perfectly new.'⁽²⁾ The exception of the first voyage seems to have been always made in England.⁽³⁾ But it has been distinctly held in Massachusetts and New York, that the allowance of one third new for old is to be made, though the vessel be new, and on her first voyage.⁽⁴⁾ And this is the construction of the rule which is most generally adopted in the United States. But in the case of damage to the sheathing of a vessel newly copper-sheathed at Baltimore, which it became necessary to copper-sheath again on her arriving at Charleston, the insurers paid the expense without any deduction. This adjustment was not made, however, upon the ground of any definite exception in respect to the first voyage.

(2) *P. I. c. 3. p. 159.*
(3) *Weak. tit. Repair, n. 1.*
(4) *Nickels v. Maine F. & M. Ins. Co. 11 Mass. R. 253; Dunham v. Com. Ins. Co. 11 Johns. 315.*

The deduction of a third is never made from the cost of a new anchor. But it seems that there is no other exception made to the rule on account of the kind of article lost or damaged. The deduction is made from copper-sheathing, copper and iron fastenings, or a chain-cable.

The old materials, such as copper-sheathing, cables, &c. which are replaced by new, belong to the insurers, as far as they are liable for the amount of the partial loss. The proceeds of such old materials are, therefore, to be deducted from the amount for which the insurers are liable; that is, after the deduction of one third new for old.

Deduction of proceeds of old materials.

The rule of deducting a third, extends to whatever may be considered to be a part of the repairs. If commissions are charged by a merchant, in a foreign port, on funds advanced by him to pay for the repairs, or if marine interest is paid upon a bond of hypothecation for the amount, or if expenditures of any kind are incurred directly on account of the damage to be repaired, but not as the price of the materials or labour for the repairs, or replacing what has been lost, the assured recovers

No deduction is made except on the expense of labour and materials.

In what manner the proportion of a partial loss for which the insurers are liable, is estimated.

the full amount of such expenditures as far as the subject is covered by the policy.

The expense of the repairs, and the amount of the expenditures, occasioned directly by the perils insured against, being ascertained; their sum constitutes the amount of the loss. The insurer must pay the same proportion of this amount, that the sum insured is of the whole amount of the insurable interest. If the underwriter has agreed to insure one half, or one quarter of the amount of the interest, he must pay the same proportion of the expense of repairs. This is all very plain, but then a very important question occurs as to the mode of estimating the amount of the insurable interest; since the greater the value is at which the amount of the interest is fixed, the smaller will be the sum which the insurer is liable to pay on an amount insured which is less than that value.

If 1000 dollars is insured in an open policy, on a ship worth 2000 dollars at the commencement of the risk, which sustains a partial loss of 500 dollars at a subsequent period, when her value is diminished by wear and tear, and decay, and the consumption of provisions, to 1500 dollars, shall the underwriter pay 50 per cent, or $66\frac{2}{3}$ per cent, of the loss? According to the practice, he pays 50 per cent; that is, the value of the ship at the commencement of the risk is the basis on which the partial loss is estimated.

A similar question occurs in respect to a valued policy. If 1000 dollars is insured on a ship worth 2000 dollars, but valued in the policy at 1000 dollars, sustains a partial loss, amounting to 500 dollars, must the insurer pay the whole loss or only 50 per cent of it? A reason for his paying the whole loss is, that he has insured the whole value of the ship. But a reason why he should pay only half of the loss is, that, as between the parties, the agreed value of the ship is 1000 dollars, and since only one half of the ship is destroyed, and to be replaced, he ought to pay but one half of her value as between him and the assured. And this is the rule adopted in practice, and sanctioned by the courts under the maxim of *opening* the policy in case of partial loss. A contrary doctrine would involve the inconsistency of paying for damage to a thing, or the loss of a part of it, more than the parties had agreed to consider the whole of it, as between themselves, to be worth.

(1) *Saltus v. Ocean Ins. Co.* 12 Johns. 107; *Schiefelin v. N. Y. Ins. Co.* 9 Johns. 21.

Extra freight. Loss of a part of the cargo.

(2) *Supr.* 290. Only freight *pro rata* earned.

Section 2. On Freight.

A partial loss on freight is occasioned by the loss of the ship, after a part of the voyage is performed, which makes it necessary to hire another ship to carry on the cargo to the port of destination in order to earn the freight; (1) or a loss of a part of the cargo, whereby the ship is prevented from earning a part of her freight. (2)

Where on account of the perils insured against, only freight *pro rata* is earned, this is a case of partial loss upon this in-

terest. Mr. Justice Putnam, giving the opinion of the court, says, 'If the ship should have carried the goods to a port within one day's sail of the port of destination, but should be disabled, by the perils in the policy, from completing her voyage, the assured would be entitled to recover for the loss. In such case, if the assured should have received ninety per cent for carrying the goods so far as the port where the ship was obliged to stop; it would be evident that he had a right to recover only for a partial and not for a total loss.'⁽¹⁾

If goods arrive in bulk, though, in consequence of sea-damage or otherwise, they are of no value, still the whole freight is due,⁽²⁾ and accordingly the assured on freight has no claim for any loss. And so, if the supercargo or captain sell goods at some intermediate port, short of that for which they were shipped, on account of sea-damage, deterioration occasioned by the qualities of the article, or other cause, which might probably diminish or destroy the value in the subsequent part of the voyage, but still leave them remaining in bulk, the entire freight to the port of destination will be due on such articles, since the master of the vessel is ready to carry them on; it being a rule that the whole freight will be due, if the goods remain in such a state that they can be transported to the port of destination, and the master is ready to carry them thither.

If the ship is wrecked in the course of the voyage, and the master either has not the means of carrying, or does not offer, or is not ready to carry the goods to the port of destination, and the shipper consents, himself or by his agent, either expressly or by implication, to receive his goods at the intermediate port; only freight *pro rata* is due.⁽³⁾

If in consequence of sea-damage or any peril insured against in the policy on the freight, and without the fault of any party, some part of the cargo would be destroyed, both in value and bulk, before the arrival at the port of destination, and on this account is discharged and sold at some intermediate port, or if the article, as in case of damaged vegetable substances, would be likely to produce disease if kept on board,⁽⁴⁾ the case seems to be very similar to the preceding, which has been held by all the courts to be one of *pro rata* freight,—in each case the master is not able or is not ready to carry on the goods, and the shipper may reasonably be presumed to consent to receive them at an intermediate port, provided the *pro rata* freight does not exceed their value. And if it be considered that only freight *pro rata* is earned, it becomes a case of particular average. But the loss must, for this purpose, arise from a peril insured against. In cases of the sale of goods at an intermediate port, however, the whole freight is usually allowed, and in most instances there can be no question of its being due, as it cannot appear that the goods might not arrive at the port of destination in bulk.

It has been intimated in some instances that the expenses attending a detention by embargo or other cause, constitute a particular average on freight;⁽⁵⁾ no deliberate opinion seems, however, to have been ever given to this effect, but the contrary has

(1) Coolidge v. Gloucester Mar. Ins. Co. 15 Mass. Rep. 345.

(2) Lutwidge and another v. Grey and others, Abbott on Mer. Ships, 298.

Pro rata freight.

(3) Story's Abbott, 237. [296.] n.; Frick's Jacobson, 268. n.

Case of sale of damaged goods at an intermediate port.

(4) Stevenson on Av. P. I. c. 2 s. 1. p. 81.

(5) Jones v. Ins. Co. of N. A. 4 Dall. 246.

Whether the expenses of detention are a particular

average on freight.

(1) *Henshaw v. Mar. Ins. Co.* 2 Caines, 279. See also the opinion of the same judge, 2 Caines, 286. and also *M'Bride v. Mar. Ins. Co.* 7 Johns. 431.

(2) *Ins. Co. of N. A. v. Jones*, 2 Bin. 547.

(3) *Mayo v. Maine F. & M. Ins. Co.* 4 Mass. Rep. 374.

For what part of a partial loss on freight the underwriter is liable.

been explicitly decided by different courts. Mr. Justice Livingston, of New York, speaking of the expense of wages and provisions during a detention, said, 'As these expenses occasion a diminution of freight only, that subject alone must be considered as loser, and its underwriter, if there be any, called on for indemnity.'⁽¹⁾ But the other judges did not express any such opinion.

Under a policy on the freight of a ship detained at Bourdeaux by an embargo, the freight being subsequently earned, the assured claimed the amount of the expense of wages and provisions during the detention, as a particular average. Chief Justice Tilghman, giving the opinion of the court, said, 'That this loss cannot be recovered from the insurers on the freight exclusively, may be strongly inferred from the nature of the contract, which engages that the freight shall not be lost, and in fact no part of it has been lost.' Rush, president of the court, said, 'To render an insurer liable, the loss should happen to the property or interest specifically insured. Neither the insurer of the ship, cargo, or freight, is liable to pay the expenses of an embargo.'⁽²⁾

In a case of insurance upon freight, the vessel was captured in the course of the voyage, and detained two months: being released, she pursued the voyage and earned freight. The assured claimed a particular average on account of the detention. Chief Justice Parsons said, 'The underwriters did not insure any particular time in which the voyage should be performed; but only that the freight should be earned. They are therefore not answerable for a partial loss, on account of the increased length of the voyage by the detention, any more than they would have been if the arrival of the vessel had been delayed by violent storms, which had driven her out of her course.'⁽³⁾

The amount for which the underwriters are liable, in a partial loss of freight, is computed in the same manner as a partial loss on the ship, except that the amount of the insurable interest is not calculated necessarily in reference to the commencement of the risk. If a part of the original cargo is discharged in the course of the voyage, or lost by inevitable accident, the amount of this interest at risk is thereafter less. Where the sum insured, whether in a valued or open policy, is less than the value of the interest at risk when a partial loss happens; the underwriter pays the same proportional part of the loss, that the sum insured is of the value of the interest at risk; but if the sum insured is equal to the value at risk, he pays the whole of the loss.

There is no difficulty, it seems, in adjusting the amount of a partial loss on freight, since the whole amount of the interest is definitely fixed by the bills of lading or charterparty, or, in case of the ship and cargo belonging to the assured, the amount is determined by estimation, according to the current rate of freight for the same voyage, and the whole amount of the interest and that of the loss being ascertained, the rate per cent of the loss is readily found. In case of partial loss on this interest

the insurer does not take the risk of the responsibility of the shipper or consignee; he does not guaranty that the part of the freight earned shall be paid; he is exonerated as far as the freight is earned, and it is only in case of total loss and abandonment, whereby he is put in the place of the assured, that he takes the risk of recovering of the shippers or consignees the part of the freight which is earned.

Section 3. On Goods.

In case of the destruction of a part of the goods, the underwriter pays their value according to the invoice or valuation; and the rule is the same in case of the loss of half of the value of the goods by sea-damage or otherwise, though they remain in bulk. Except in one case, which will be mentioned, the underwriter has nothing to do with the state of the markets in adjusting a particular average on goods, the amount of which will be the same, whether the goods come to a losing or gaining market. The insurer does not engage to make good all which the assured has failed of gaining in consequence of the perils insured against, but only what he has lost of the value insured, that is the invoice price or valuation.⁽¹⁾

(1) V. Supr. c. 14.

A particular average is usually adjusted at the port of delivery. If the loss is occasioned by the entire destruction of a part of the goods insured, the insurer is liable to pay for them, as far as they are covered by the policy, at the price at which they are insured, and such a loss is easily adjusted, there being no difference of opinion or practice respecting it.⁽²⁾

Partial loss by the destruction of a part of the goods.

(2) Supr. 313.

If the particular average is occasioned by damage to the goods, whereby their value is diminished, though they remain in bulk, there seems to be but one, and that a very plain way of estimating the degree of damage. If in consequence of the damage the goods sell for only half what the same goods would have sold for if sound, the direct loss by the damage is fifty per cent, and the insurer must pay, not half of the price of sound goods at that market, but half of the value at which he insured the goods. This is too obvious to admit of any doubt.^(a)

(a) *Lewis v. Rucker*, 2 Burr. 1167; *Johnson v. Sheddon*, 2 East, 581; *Hurry v. Roy. Ex. Ass. Co.* 3 B. & P. 308; *Usher v. Noble*, 12 East, 639; *Dick v. Allen*, Park, 167; *Lawrence v. N. Y. Ins. Co.* 3 Johns. Cas. 217.

In insurance against fire the insurers usually stipulate in the policy to pay the whole of any loss which does not exceed the amount insured; that is, if 1000 dollars be insured on furniture, goods, or a house worth 2000 dollars, and damage happen by fire to the amount of 1000 dollars, the insurer pays for the whole damage; whereas, according to the principles of adjusting a partial loss under a marine policy he would pay for but half of it.

Partial loss in insurance against fire.

In a policy on profits or commissions, it is frequently agreed to adjust any loss at the same rate as on the goods. In case of damage to the goods, or the destruction or absolute loss of a part of them,

Partial loss on profits and commissions.

Whether the loss by payment of full freight on damaged goods is within the policy.

(1) Vol. 1. s. 38, p. 39. & p. 214. cas. xvi.

But a question still occurs which has caused much discussion and perplexity. Magens thinks that the loss by payment of full freight on damaged goods, is to be included in an estimate of a partial loss. He supposes the goods to be damaged fifty per cent in value, without any diminution of their bulk, and accordingly that the full freight is due at the port of destination. (1) Suppose that the goods, if they had arrived sound, would have sold for 1000 dollars, but arriving in a damaged state, though undiminished in quantity, they are sold for 500 dollars, the freight being 100 dollars. By the damage to the goods, the assured has lost fifty dollars in the freight, since he pays 100 dollars to place the value of 500 dollars in the market; whereas, had the goods arrived without damage, he would, at the same expense, have placed the value of 1000 dollars in the same market. Magens thinks that this loss ought to fall upon the insurers.

Whether loss by duties, &c. on damaged goods is within the policy.

(2) Ut Supr.

The same question occurs in relation to wharfage, duties, &c. in case the assured has to pay more on the damaged goods in proportion to their value, than he would have been liable to pay had they arrived sound. Magens (2) has involved this question in great perplexity by saying, that in order to cover these losses, the particular average ought to be adjusted on the net proceeds, according to the rule of computing the same kind of damage in adjusting a general average.

An adjustment on the net proceeds is not correct.

It will readily appear that the calculation upon the net proceeds will not be correct upon any principle whatever. Suppose the invoice value of goods insured, in an open policy, to be 500 dollars, of which the freight and other charges in question are 200 dollars. If the goods had arrived sound, the gross sales would have been 1000 dollars, but being damaged they sell for only half of that sum, and yet the freight and other charges in question are supposed to be the same. According to Ma-

it is plainly a loss of the same proportional part of the profits, and if it be so considered, a loss of this sort would be adjusted at the same rate on each, though the policy should contain no stipulation in this respect. *Loomis v. Shaw*, 2 Johns. Cas. 36. But it does not appear that a loss on the goods by expenditures or general average, is a loss under a policy on profits or commissions, unless it be made so by express stipulation. But the profits being, as Lord Ellenborough says, an excrescence on the goods, the insurers of this interest ought, upon principle, to be liable for a proportion of the expenditures incurred on account of the goods, since these are the expenses of labouring, &c. for the safety of the subject, and to prevent a total loss of the profits. But in some instances the expenses are wholly paid by the insurers of the goods, where the value of the goods, on account of which the expenditures are incurred, does not exceed their value in the policy. And where the expenditures are not wholly refunded by those underwriters, it is difficult to adopt any general rule as to the rate of apportioning these losses under a policy upon the profits. For these reasons a policy upon profits ought always to contain an agreement as to the adjustment of partial losses.

Magens's rule, as it is understood by Mr. Justice Lawrence, from statement of a loss made to the court, (1) the insurer would be able to pay five-eighths of 500 dollars; since, by this mode of computation, the amount of sales of the sound goods would be 200, of the damaged goods 300, and the difference of these compared with the gross sales of the sound goods gives the rate of damage.

Mr. Justice Lawrence shows the incorrectness of this rule very clearly, since the deductions remaining equal, the proportional difference of the proceeds of sound and damaged goods will be greater, if the goods come to a losing market; or in other words, the particular average, for the same damage will be thereby increased. (2) This shows conclusively that the mode of computation is erroneous.

But the real question is, whether the loss occasioned by the payment of the same freight, duties, &c. on a smaller value, on account of the damage, is a consequence of the peril insured against, for which the underwriter is liable to make indemnity. If it be assumed that this is a consequence for which the insurer is liable, an adjustment on the net proceeds will not give indemnity. The most that can be demanded for the assured, is, that the loss shall be adjusted upon a comparison of what he actually receives, the goods being damaged, with what he would have received had they arrived sound. Assuming the invoice value, the proceeds of the sound and of the damaged goods, and the amount of freight and duties as before, the assured receives 200 dollars less on the gross sales than he would have received had the goods arrived sound. Had the goods arrived sound he would have received 1000 dollars gross proceeds by paying 200 dollars freight, duties, &c. and as he pays the same sum, to place half of the value in the market in the case of damaged goods, he loses comparatively 100 dollars in freight, duties, &c. This makes the loss six-tenths of the invoice value, instead of five-eighths according to the rule of Magens; that is, a proportional part of the freight and charges should be added, corresponding to the rate of loss by direct damage to the goods.

Here a question occurs, whether all these losses are to be placed upon the same footing; the loss in freight takes place while the goods are water-borne, or at least at the moment they are landed, and in virtue of a contract to which the insurance necessarily has some relation; and the loss is pretty certain; whereas the loss by duties is uncertain, depending upon the rules adopted by the government in levying duties; it occurs on land rather than at sea, and seems to have a very remote relation to the contract of insurance. In regard to the loss arising on account of duties, port charges, &c. after the arrival of the vessel, the court of King's Bench decided, explicitly, that they are not subjects of indemnity; (3) and this opinion was followed in the Common Pleas. (4) The same opinion was given in New York a few months after the first of the preceding cases was decided, but before the decision was known in New York. (5)

How the computation ought to be made, if loss by freight, &c. is included.

Whether loss by freight and by other charges are equally the consequences of the peril.

(3) Johnson v. Sheddon, 2 East, 581.

(4) Hurry v. Roy. Ex. Ass. Co. 3 B. & P. 308.

(5) Lawrence v. N. Y. Ins. Co. 3 Johns. Cas. 217.

All of these cases involved the question of loss by freight; but the English courts did not consider this question particularly, and in regard to the loss by duties and charges, they took for granted that it was not covered, without any elaborate consideration of the reasons in support of the doctrine. Their attention was mostly confined to the question respecting the mode of computing the loss, and the weight of the authority of their opinions bears mostly upon that point.

The case decided in New York very distinctly presented the question of loss by freight, as well as duties and charges. Mr. Justice Thompson said, 'I am of opinion that the underwriter ought to pay the proportion of the prime cost, corresponding to the proportion of the diminution of the gross sales. The other mode of calculation appears to me to be making the underwriters indirectly answerable for the freight, duties, and charges, with which they have nothing to do.' Mr. Justice Kent's opinion turned mostly upon the incorrectness of the rule of computing according to the net proceeds. But proving this rule to be wrong, does not necessarily prove that the insurer is not answerable for the loss by freight, duties, and charges; and the loss on these may be included without involving any of the consequences which prove the incorrectness of this rule, excepting one mentioned by Mr. Justice Thompson. He says, 'the underwriter never ought to be made liable to pay more than a total loss,' and 'the computation upon the net proceeds 'would in many instances make him pay more than a total loss.'⁽¹⁾ But it has already appeared that he may be liable for more than the value at which the whole property is insured,⁽²⁾ which value is what the judge means by a total loss.

(1) 5 Johns.
219, 220.

(2) Supr. 329.

But the question of the liability of the insurers for the loss by freight, duties, and charges, on damaged goods, was presented in all these cases, and the result of the opinions was an exoneration of the insurers from this loss. The reasons in favour of this result, in respect to the duties and charges in port, seem to be very strong, since nothing prevents the adjustment of the loss at the moment of unloading the goods, when the risk ceases, without taking into consideration the loss arising from the revenue laws, port regulations, expenses of wharfage, drayage, storage, &c. which seem to be remote consequences of the damage. They arise more directly from the regulations of trade, and the revenue laws, and the disposition which the consignee chooses to make of the goods, than from the damage to the goods. It is not a part of the understanding, between the parties to the policy, that the goods are intended to be sold for consumption at the port of destination. Nothing prevents the consignee from transshipping without landing them, if the laws of the port permit it; and in that case the question as to loss by duties, in that particular port, is not likely to arise. The comprehending this loss among those insured against, evidently leads to considerations very remote from the perils enumerated in the policy.

In regard to the loss by freight, it has been held that in some cases the insurer of the goods is liable for the excess of freight

which the assured is obliged to pay in consequence of the perils insured against.(1) But in those cases the extraordinary freight paid, may be considered a part of the expense of labouring, &c. for the preservation of the property, and to prevent a total loss by the breaking up of the voyage; and the underwriter expressly stipulates to pay such expenses.

The court in New York said, that the expenses of a 'sale at auction to ascertain the injury the cargo had received, and limited to such parts as were damaged, would be a reasonable charge.' It would be allowed, however, only in case of its being necessary, in order to adjust the loss.(2) Mr. Stevens puts this charge upon the same grounds as that of freight, duties, and other charges.(3) If a *pro forma* sale at auction is made for the purpose merely of adjusting the loss, the expense is very similar to that of a survey and appraisalment for the same purpose, and seems to be a part of the loss. But if the goods are actually sold, or intended to be so, and are wholly or in part, bought in by the assured, merely because he does not think the price offered sufficient, there does not appear to be any reason for considering the expense of the sale as a part of the loss. The assured would have been at this expense had the goods all arrived sound.

If different articles are damaged, the loss ought to be adjusted on each, separately; since otherwise the adjustment will be erroneous, unless the degree of damage is the same on all, or, which would hardly ever happen, the difference of the invoice amounts, and the difference of the degrees of damage, should reciprocally countervail each other in the computation.(4)(a)

A particular average is usually adjusted at the port of destination, and when it is adjusted there, the mode of adjustment is always as above stated. But if it is adjusted at some other port, the mode of adjustment depends on the reasons for making it at any other than the port of destination. The assured may put an end to the risk whenever he pleases, by voluntarily receiving his goods short of the port of destination. If he receive his goods at any intermediate port, on account of a favourable market there, an average loss is adjusted upon the same principles as at the port of destination. And it does not appear that he has not a right to such an adjustment, if he chooses it, for whatever reason the goods are received by him

Expense of sales at auction.

(2) *Muir v. Unit. Ins. Co.* 1 Caines, 54.
(3) *Part. Av.* s. 3. a. 1. p. 101. n.

(4) *Stevens, tit. Partid. Av.* s. 3. a. 7. p. 143.

A particular average adjusted at a port other than that of destination.

(a) The following examples will show the incorrectness of computing losses on different articles together.

	Invoice value.	Sales of sound.	Sales, being damaged.	Rate per cent of loss.	Amount of loss.
Coffee,	250	500	260	60	150
Cotton,	300	100	25	75	225
Coffee, }	550	600	225	62 1-2	343 2-3
Cotton, }					

Thus the loss on both articles being computed separately, is 375 dollars; but computed on both together, is 343.66. And a similar error would result from computing the amount of damage on different sorts of the same kind of article, invoiced at different values.

and withdrawn from the risks insured against, short of the port of destination.(a)

A salvage loss.

(1) Stevens, p. 79.

But in case of damage by sea-water or other cause, where the damage would be increased by keeping the goods on board, and the goods might be rendered of little or no value on arrival at the port of destination, they are sometimes sold at some intermediate port. The reason of selling them at the intermediate port is not to take advantage of the market there, but to prevent their being spoiled and totally lost, in consequence of damage by the perils insured against. 'In such cases, though the property is not abandoned to the underwriter, the principle of abandonment is assumed and acted upon.'(1) The loss is adjusted in the same manner as if the goods had been abandoned, in which case the insurer pays for them at the invoice price or valuation, and is entitled to whatever is saved, after deducting all expenses including that of freight. The net proceeds are in the nature of salvage, and this is accordingly called a *salvage loss*.

(2) *Suydam v. Mar. Ins. Co.*
2 Johns. 143.

A cargo was compulsorily taken away from the master of a vessel by the officers of the government, at Port Republican, in St. Domingo, in exchange for some specie, and such a quantity of goods as they had a mind to give him. As the assured, not having made abandonment, was not entitled to recover for a total loss, a question occurred as to the mode of adjusting a partial loss. The invoice price of the goods taken from the master was 12,041 dollars. The value of the specie and goods given to him in exchange was, at Port Republican, 10,162 dollars. The proceeds of the same goods in New York, deducting *duties* and *charges*, and adding the amount of specie, were 8,667 dollars; but deducting also freight from Port Republican to New York, were 7,919 dollars. The only question made, was, which of these three sums must be deducted from the invoice value, it being taken for granted that one of these differences was the amount of the partial loss. The court decided that the value, at Port Republican, of the goods and specie received in exchange, was the true amount saved; and that the difference of the two first sums, namely 1,879 dollars, was the amount of the loss.(2)

It was assumed by the court, and the parties, that the loss was to be adjusted as a salvage loss. If it be supposed that the amount of goods and specie, given in exchange for the cargo at Port Republican, depended at all upon its value there, which seems to be altogether probable, this mode of adjustment threw the risk of the market upon the insurers, since the lower the price of the cargo was, the smaller would be the amount of specie and goods given in exchange for it. Suppose the value of the cargo at Port Republican to have been double the invoice price, and the officers of the government there had taken the whole

(a) Mr. Stevens says, a particular average cannot be adjusted in the usual mode, short of the port of destination; tit. Partic. Aver. s. 1. p. 80. but it does not appear why it may not.

cargo, giving in exchange goods or money of half its value. According to the above mode of adjustment the assured would in this case have lost half of his goods, and yet not have been entitled to recover any thing of his underwriters. If the loss had been adjusted in the usual way, by comparing the market price, with the value given in exchange for the cargo in the compulsory sale, and thence finding the amount lost upon the invoice value, it would have given the assured the advantage of a gaining, or the disadvantage of a losing market, and have exempted the insurers from any risk of the market.

A question similar in principle occurs in relation to expenses incurred, or a compromise made, on the separate account of the ship or cargo, or any part of the cargo. Expenses of the descriptions in question, are most frequently subjects of general average, and accordingly if any interest contribute on a value exceeding that in the policy, the contribution on the excess falls upon the assured. The same rule ought evidently to be extended to expenses incurred on a separate interest, which constitutes particular average, since the master, or other person, having charge of the property, is necessarily governed by the value of the property at the time of the transaction, in determining on the amount to be given by way of compromise, or incurred in expenses to save the property. The agent must in such cases do what is prudent and advisable, and what a person not insured would do under like circumstances, and in determining what to do, he would of course be governed by the value of the property at the place where it should happen to be at the time of the transaction. And in case of compromise with captors, or of salvage, the captors or salvors are governed by the same value in fixing the amount of their claim.

What proportion of expenses which constitute a particular average, the insurers ought to pay.

It would plainly be unreasonable that the insurer should be liable to pay the whole of the expenses, the amount of which is determined by considerations foreign to his contract. Accordingly, if the value of the property, at the time of the transaction, exceeds its value in the policy, the sum which they are liable to pay, should bear the same proportion to the whole amount of the expenses, that the value in the policy bears to the value on account of which the expenses are incurred.

CHAPTER XVII.

TOTAL LOSS AND ABANDONMENT.

Section 1. In what cases Abandonment is necessary in order to give a Claim for a Total Loss.

Total loss defined. A TOTAL LOSS is one by which the underwriter is liable to pay for as much of the subject as he insures, at its value in the policy. In adjusting the amount of a total loss, the only question is, what is the value of the subject in the policy. In a partial loss the underwriter is not liable to pay the entire value, as such, at which the subject is insured, and to the amount insured. In adjusting a partial loss it is always necessary to inquire, not merely what is the value of the subject in the policy, but also what is the rate or degree of damage.

Abandonment may be made in case of total loss.

A total loss gives the assured a right to abandon. An abandonment is an act on the part of the assured, by which he relinquishes and transfers to the underwriters his insurable interest, as far as it is a subject of the policy, or the proceeds of it, or the claims arising from it. In considering what circumstances give the assured a right to abandon, we shall necessarily consider what constitutes a partial, and what a total loss.

Where the assured has no right of property, as in the life of a person on whom he depended for support; and where the subject is so completely destroyed and lost, that the assured has no rights, or claims, or advantages, in consequence of his property in it, as in the case of goods consumed by fire, or a lottery ticket that has drawn a blank, it is not requisite that he should go through with any form of transferring his interest to the insurers, or make any offer to this effect.(1) In case of the 'destruction of the whole subject, the ceremony of abandonment would be idle.'(2)

(1) Park, 228. n. ; 8 Johns. 246.
(2) 2 Johns. 155.

Technical or constructive total loss.

The thing insured being irretrievably lost, the assured has a right to recover the value at which the whole or any part of it was insured; and the amount recovered will be the same whether the loss be treated as partial or total,—whether the inquiry be what value was insured merely, or that, and also what is the amount of damage, for they are both the same amount. But if the property or any part of it survives the peril, as in case of shipwreck, without a total destruction of the thing insured, or of detention or capture before condemnation; or if any rights or claims remain to the assured as owner of the property, as in case of a claim for remuneration of damage against those who have seized the property, it is just that he should transfer to the underwriters the remains of the property, or the rights accruing to him as owner, in case of his receiving of them

the amount insured. Losses of this description are called *technical* or *constructive* total losses, in which an abandonment ought to be made, in order to give the assured the right of recovering the entire value insured. 'Where any part of the property has been saved, the assured cannot recover as for a total loss, unless he abandon.'⁽¹⁾

Mr. Justice Buller intimates a doubt, whether abandonment should have been permitted at all, and says, that 'about the year 1745 that question was determined, after much deliberation.'⁽²⁾ But in cases of capture and detention, insurance would afford a very inadequate indemnity to the assured, without the right to abandon, and in many cases of sea-damage, the indemnity would be long delayed and very difficult to adjust. Lord Mansfield said, 'in late times the privilege of abandonment has been restrained for fear of letting in frauds.'⁽³⁾

Mr. Justice Story says, on the contrary, 'It has been said, that abandonments are not to be favoured; that they have been liable to great abuses; and that courts of law are not disposed to enlarge the practice. I am very much inclined to believe that of late years this consideration has had quite as much weight as it deserved.'⁽⁴⁾

The assured has his election in all cases, whether or not to make abandonment; 'all the books agree that he is never obliged to abandon.'⁽⁵⁾ 'The object of abandonment is to turn that into a total loss which would otherwise not be so;'⁽⁶⁾ and the assured may choose whether he will change the character of his claim against the insurers by making an abandonment. In some cases however, he will have no claim against the insurers unless he makes an abandonment; in others he may recover for a partial loss, without abandonment, or abandon and recover for a total loss.

In a case of seizure of the vessel of which freight was insured, and an action brought by the assured without any abandonment, 'Chancellor Lansing said, 'The assured, by his delay, has waived his right of abandoning, so far as might operate to convert a partial into a total loss, and has left the insurer the chance of enjoying any advantage, arising from the restoration, before the time of bringing his action.' But as the loss continued to be total at the time of bringing the action, he thought the assured might recover.'⁽⁷⁾

In case of the insurance of freight from Quebec to London, the ship, before leaving the river St. Lawrence, was stranded about 90 miles below Quebec, in so dangerous a situation that the captain was held to be justified in selling the ship and cargo, without making any attempt to get the ship off for the purpose of prosecuting the voyage. On receiving intelligence of the disaster the assured communicated it to the underwriters, and claimed a total loss, but did no act which was considered by the court as amounting to an abandonment of the freight. And the court said, 'We do not think it was necessary to abandon.'⁽⁸⁾ There seemed to be nothing in this case upon which an abandonment might operate.

(1) 1 T. R. 608. See also *Martin v. Crockett*, 14 East, 465; *Tunno v. Edwards*, 12 East, 491.

Whether the right of abandonment is to be favoured.

(2) *Mitchell v. Edie*, 1 T. R. 608.

(3) *Goss v. Withers*, 2 Burr. 683.

(4) *Peele v. Merch. Ins. Co. C. C. U. S. Mass. Oct. 1822*. 2 Masson. 66

The assured has an election whether to abandon or not.

The ship being stranded and sold no abandonment of freight is considered necessary.

(5) 8 Johns. 244; *Allwood v. Henckell*, Park, 280; 1 Johns. Cas. 313; 2 Johns. Cas. 250; 2 Burr. 1211.

(6) *Gracie v. N. Y. Ins. Co.* 8 Johns. 183.

(7) *Smith v. Steinback*, 2 Caines' Cas. 174.

(8) *Idle v. Roy. Ex. Ass. Co.* 3 Moore, 115.

The ship being disabled and broken up, an abandonment held necessary.

(1) *Bell v. Nixon*, 1 Holt, 423.

(2) *Ib.* 426. n.

(3) *Green v. Brown*, 2 Str. 1199; *Newby v. Read*, Park, 106; *Twemlow v. Oswin*, 2 Camp. 85; *Brown v. Neilson*, 1

Caines, 525.

Whether in case a vessel is not heard from, a total loss may be recovered for without abandonment.

(4) *Cambreling v. M'Call*, 2 Dall. 280; S. C. 2 *Yeates*, 281.

(5) *Gordon v. Bowne*, 2 Johns. 150.

Whether in case of capture a total loss may be recovered for without abandonment.

(6) *Watson v. Ins. Co. of N. A.* 1 Bin. 47.

(7) *Brown v. Phœn. Ins. Co.* 4 Bin. 445.

A ship having sailed on a voyage from Hull to Quebec, and received considerable damage, was compelled by bad weather to put into Limerick, where she could not be repaired for want of materials and docks, and she was too much disabled to be removed to another port suitable for making repairs. She was accordingly broken up there. Upon the question, whether the assured could recover for a total loss without abandonment, Dallas, J. said, 'In some cases he may claim a total loss without abandonment. But, if the case be doubtful, the assured ought not to take upon himself to determine for the underwriters—to break up the ship, and to call upon them for a total loss. I think he should have communicated to them the state of the vessel.'(1) The whole court were afterwards of opinion that an abandonment was necessary to entitle the assured to a total loss.(2)

If the vessel is not heard from for a long time it is considered to be totally lost by perils of the seas.(3) A vessel that sailed from N. Carolina for St. Thomas's, was not heard from for six years after the time of sailing, and it was held that an abandonment was not necessary in order to entitle the assured to recover the amount insured. Chief Justice M'Kean said, 'We cannot see that, where there is nothing left to give up, there can be any thing to abandon. It would be useless to insist on a formal act of abandonment.'(4)

In the case of a vessel that sailed from N. Carolina to New York, and was not afterwards heard from; Chief Justice Kent said, that, 'after the lapse of a year, considering the voyage, the presumption that the vessel had perished was reasonable.' And considering it as proved that the whole subject had perished, the time of the trial of the action being four or five years after the sailing of the vessel, he said 'the ceremony of an abandonment would have been idle.'(5)

So in a case of capture and condemnation of the property, the assured brought a suit to recover the loss without having made any abandonment; Chief Justice Shippen said, 'Where any part of the thing insured is left, the assured is bound to abandon in order to enable him to recover as for a total loss; the only penalty for not abandoning, is, that the assured must be satisfied with an average loss.' And the court was of opinion that the assured might recover, leaving it to the jury to estimate the value of the chance of the reversal of the sentence of condemnation, and the restoration of the property. Mr. Justice Brackenridge, however, thought that if there had been any reasonable probability of recovering the property,—if the chance was worth any thing; the assured ought not to recover the loss without abandonment.(6)

In a subsequent case, Chief Justice Shippen seems to have changed his opinion, and considered an abandonment requisite in such case. And Mr. Justice Brackenridge said, if abandonment was not necessary in such a case, in order to enable the assured to recover, he did not see that it was so in any case whatever.(7) It seems to have been the opinion of one of the

judges in England, that abandonment was necessary though the ship and cargo had been sold and converted into money, when notice of the loss was received.(1)

(1) *Hodgson v. Blackiston*, Park, 281. n. Property seized by a foreign government.

But in a case of the seizure of the property, by officers acting under the Swedish government, Lord Ellenborough said, 'The general convenience of making an abandonment has led to an opinion that it is more necessary than it really is. A party is not in any case obliged to abandon, neither will the want of abandonment oust him of his claim for that which is, in fact, either an average or a total loss, as the case may be. Where there is an abandonment, the risk is thrown on the underwriters; where there is no abandonment, the party takes the chance of recovering according to his actual loss.' And the court was of opinion that the assured in this case might recover according to his actual loss.(2)

(2) *Mellish v. Andrews*, 15 East, 13.

Under a policy upon salt-petre imported from India, which was condemned at the Cape of Good Hope, and sold in pursuance of the sentence of condemnation, which sentence was reversed on appeal, Lord Ellenborough said, 'As to abandonment, if instead of the salt-petre having been taken out of the ship and sold, and the property devested, and the subject matter lost to the owner, it had remained on board, and been restored at last to the owner, I should have thought there was much in the argument that, in order to make it a total loss, there should have been notice of abandonment, but here the property itself was wholly lost, and the necessity of abandonment was altogether done away.'(3)

The cargo sold under a decree of condemnation and the decree reversed.

(3) *Mullett v. Shedden*, 15 East, 304.

Chief Justice Kent says, 'This court has repeatedly decided that abandonment is not essential to enable the assured to recover a total loss, if the loss be actually total, and continue so to the bringing of the suit.'(4) But Mr. Justice Livingston, of the same court, speaking of a case in which the master was compelled to sell the cargo at a reduced price, said, 'though it be settled with us that an abandonment is never too late while the loss continues total; yet we have not said that a suit can be maintained without any abandonment at all.'(5) But this position seems not to be strictly accurate, since some of the preceding cases show that the assured may recover for a total loss without making any abandonment.

(4) 2 Caines, 208.

(5) 1 Johns. 191.

It accordingly appears to be the opinion of all the judges of the different courts, that in case of the destruction of the property, the assured may recover the value insured without any abandonment. But what circumstances, short of the absolute destruction of the property, will constitute such a loss of it as will entitle the assured to recover the whole value without abandonment, seems to be a matter of some uncertainty. Where the only thing remaining to the assured, is the chance of recovering property captured or arrested, where there is any probability at all of recovering it, it seems reasonable to require an abandonment, or that the assured should claim only for a total loss; since, as Mr. Justice Brackenridge remarks, an estimate by the jury of the value of the chance of recovering the

(1) 4 Binn.
472.

property must be very vague and unsatisfactory.(1) And if such an inquiry were permitted it would not render abandonment the less expedient on the part of the assured, since all the doubt and uncertainty would justly operate to his prejudice, both because he is entitled to recover no more than he can satisfactorily prove to be the amount of his loss, and also because he might prevent the embarrassment by making an abandonment.

In what cases
abandonment
must be made
of freight to
recover for a
total loss.

In regard to freight, as far as the freight insured has been earned, and become absolutely due, the contract of insurance is satisfied. If freights between different ports successively, and becoming absolutely due at the several ports of delivery, are insured in one policy, and after one or more of the freights is earned, a total loss upon this interest takes place, an abandonment can have relation only to the freight pending at the time of the loss. In respect to the freights previously earned, they have either been paid to the assured, or his claim for them is become absolute, and thus have ceased to be exposed to the perils insured against. In respect to such freights, therefore, the insurers are discharged, since all that they agreed, in the policy, to be answerable for, has been accomplished. An abandonment accordingly has no operation upon freight earned.

Under a policy upon freight, an abandonment can only transfer certain rights and advantages in relation to freight which is pending; in which an interest has accrued, on account of a contract respecting it, and something done towards earning it. Accordingly, if the ship and cargo are both entirely lost, though the loss happen after a greater part of the voyage is performed, no abandonment is requisite in order to recover for a total loss of freight, there being nothing to abandon, since the assured has not, in consequence of what has been done under the contract for freight, acquired any rights which can be of any value to the underwriters, it having become utterly impossible to earn any part of the freight insured.

(2) Green v.
Roy. Ex. Ass.
Co. 1 Marsh.
Rep. 447; 6
Taunt. 68.

Freight being insured, the ship put back and was sold on account of damage; and the cargo was also sold. It was objected, to a claim for a total loss of the freight, that no abandonment had been made. Gibbs, C. J. was of opinion that there was no foundation for this objection. He said, 'he could not understand what there was to be abandoned.' And the court were of opinion that there was no ground for saying that there should have been an abandonment.(2)

(3) M'Carty
v. Abel, 5 East,
393. See
also Coolidge
v. Glouc.
Mar. Ins. Co.
15 Mass. Rep.
341.

An abandonment of freight does not transfer to the underwriters the right of using the ship to complete the earning of freight. This would be to make the contract of affreightment or charterparty run with the vessel; so that if the ship were at the same time abandoned to a different underwriter, it would pass to him encumbered with an obligation to carry on the cargo to the port of destination; in regard to which Lord Ellenborough says, 'Was it ever heard of that a contract should run with a chattel? Put the case of a man purchasing a wagon as it is going on the road laden with goods, he is not bound to carry the goods to their journey's end.'(3)

A policy upon expected profits does not seem to offer any thing upon which an abandonment can operate, and it does not appear from any speculation, or any judicial opinion, relating to this subject, which has come to my knowledge, that an abandonment of this interest can be of any importance to the underwriters, otherwise than as a notice that a total loss is claimed, and if this is its only effect, an abandonment is not necessary.

Whether any abandonment is requisite in any case under a policy upon profits.

In a policy upon the profit of goods, the insurer undertakes that they shall not be prevented, by the perils insured against, from arriving at a certain market. If a part of the goods only are prevented from arriving, it constitutes a partial loss upon this interest, according to the construction put upon it in the United States. But the arrival of a part only, however small it may be, does not make a constructive total loss of the interest, whereby the assured is entitled to transfer the profit on such part, and recover the whole amount at which the interest is valued in the policy. The profits are blended with the goods, and consist of a part of the goods themselves, and it is never pretended that an abandonment of this interest transfers any property in the goods.

Under an abandonment of freight the underwriters may, in some instances, avail themselves indirectly of what has been done towards earning freight. They may in effect receive the freight *pro rata* for the part of the voyage performed previously to the event, on account of which the abandonment is made. But not so of profits; there is no profit, or any thing like a profit, *pro rata itineris peracti*, which can be assigned, or prove to be of any value, to the insurers. It does not appear, therefore, that an abandonment of profits can be any thing more than a nugatory ceremony.

In one case the court in New York were of opinion that an abandonment of profits was necessary, in order to enable the assured to recover for a total loss; but the court did not state upon what ground it was necessary, or what interest would be transferred by it.

Whether abandonment of profits can give the insurers the right of taking the goods at the prime cost.

The court suggest a query, whether an abandonment of profits would not give the underwriters on profits, a right to the goods, by paying to the underwriters to whom they were abandoned, the prime cost. But they expressly reserve their opinion on this point.⁽¹⁾

(1) *Tom v. Smith*, 3 Caines, 245; See also *Mumford v. Hallett*, 1 Johns. 133.

Neither this court nor any other has ever given effect to any such claim by a judgment in its favour. Allowing it to be practicable to apply this doctrine, it would evidently be inconsistent with a first principle of abandonment, which is always defined to be a transfer of the assured's property in the subject, as far as it is covered by the policy; whereas this doctrine would make it a transfer of only a part of his property. It has never been hinted that the assured can make any claim upon the insurers for their profits on goods abandoned, and if he has no such right, he cannot transfer it to the underwriters on profits, or to any other persons.

Under what circumstances an abandonment of commissions is requisite.

In regard to a policy upon commissions, the right of abandonment seems to depend upon the same principles as in the case of freight; the assured cannot abandon the right of earning commissions; as far as the commissions are earned and have become absolutely due, the underwriters are discharged from their liability; this being equivalent to the arrival of goods at the port of destination in the case of a policy upon the cargo. The only right then which can pass to the underwriters, by an abandonment under a policy upon commissions, is that of receiving the commissions, towards the earning of which the assured has done all that he is bound to do, but the absolute claim for which depends upon some future contingency.

(1) *Robertson v. Col. Ins. Co.* 8 Johns. 383.

If a supercargo is to receive, for selling the outward bound cargo, and investing the proceeds, a certain per cent on the sales of the return cargo, (1) and the ship is arrested on the homeward voyage; the assured may, by an abandonment, transfer to the insurers the right of receiving his commissions in the event of the release and subsequent arrival of the goods. A case of this sort, in which the assured has done what he agreed to do to earn the commissions insured, but their ultimately becoming due depends upon an event which may be prevented by the perils insured against in the policy, is the only one which occurs to me, where any right or advantage whatever can be transferred by an abandonment of this interest. If this be the only case in which any thing can be assigned by an abandonment, it is the only one in which an abandonment is necessary, as a condition on which the assured may be entitled to recover for a total loss.

(2) *Hastie v. De Peyster*, 3 Caines, 196.

Abandonment need not be made by the reassured.

It has been held that there is no necessity of abandonment in a reinsurance. The reassured could not abandon without accepting the abandonment of the assured, since he otherwise has nothing to abandon; and Mr. Justice Livingston says, giving the opinion of the court, 'It would be to the disadvantage of the reassurer to compel his assured in all cases to accept of an abandonment, which would be necessary if he himself be entitled to one.' (2)

(3) 13 Mass. Rep. 207.

(4) *Higginson v. Dall*, 13 Mass. Rep. 98.

(5) *Rice v. Homer*, 12 Mass. Rep. 230.

Section 2. *What Interest, and what Control of the Property are requisite to support an Abandonment.*

Abandonment of the whole property to prior insurers prevents abandonment to subsequent insurers.

A subject arrested by a peril not insured against cannot be abandoned.

The assured, in order to avail himself of the right of abandonment, must have the power of transferring the property insured. (3) If he has assigned all his interest by abandonment to one set of underwriters, he cannot abandon to other underwriters on the same subject. (4)

Where the thing insured is taken out of the hands and control of the assured, by some peril or act not insured against in the policy, he cannot abandon. A ship being insured against sea-damage only, after sustaining sea-damage, which constituted a constructive total loss, was captured. It was held that the assured could not abandon, since the ship had been taken out of his control by an act not insured against, and he could not transfer it by abandonment. (5)

In such case it seems reasonable that the actual loss should be recovered, and so it has been determined in New York.⁽¹⁾ The circumstance that the property is not in a situation to be abandoned, seems to be equivalent to the assured's choosing not to abandon, where he has the right, and is not prevented by the situation of the property.⁽²⁾

The consignees at Liverpool having made advances on goods shipped in the United States, and which were arrested in an American port by an embargo, abandoned to their underwriters and claimed a total loss. Lord Ellenborough said, 'It might perhaps be difficult to make out that they had such an interest as was capable of abandonment.'⁽³⁾ This seems to depend upon the question whether the possession of the bill of lading gives the consignee a right to have the possession and disposition of the property, as against the consignor; since as far as the bill of lading gives him this right, his ability to make an abandonment differs, in no respect, from that of an absolute owner.

(1) *Williams v. Smith*, 2 Caines, 20.

(2) *V. Supr.* 383.

Whether the consignees can abandon a cargo arrested in the port of loading.

(3) *Conway v. Gray*, 10 East, 530; *Same v. Forbes*, ib. 539; *Maury v. Sheddon*, ib. 540.

Section 3. Of the Ship.

If the ship is wrecked, or captured, or arrested by superior force; the assured may unquestionably make an abandonment, and recover for a total loss. But the question as to what degree of damage short of shipwreck, and what degree of restraint short of the capture, or the forcible detention of the ship, come within the principles of abandonment, has been the subject of much discussion.

In regard to capture or restraint of the ship and cargo, there is no distinction between the different subjects of insurance, as the same arrest or detention constitutes a total loss of ship, cargo, and freight. But where only the ship, or the cargo, is detained, and in cases of damage to one or both of them, there may be a total loss of one interest, and not of the others.

Where there is no intervention of force, and the assured is not prevented from having the possession and control of the ship, or what remains of her, the question of partial and total loss depends upon the degree of injury actually and directly sustained by the ship in consequence of the peril, and upon the situation in which she has been placed by the operation of the peril. If a ship is so injured and broken that she cannot be repaired and made seaworthy, or if, without having any of her timbers broken, or her hull injured materially, she is driven ashore high and dry, and cannot be put afloat again, or if the damage cannot be repaired for want of materials and workmen, the loss is considered to be total.

Where it is practicable to put the ship in a condition fit to be navigated, the construction of the loss, as to its being partial or total, depends upon the difficulties and expense of making repairs, &c. compared with the advantages expected to result from making the repairs and pursuing the voyage. It is not surprising that, in making this comparison, there should be found some

diversity of opinion upon the same state of facts ; and the cases subsequently cited will afford some instances of such a diversity. The subject of total losses has also been involved in some perplexity, by the general and indefinite language in which the principles relating to it have in many instances been stated; which makes it difficult to ascertain the precise grounds upon which decisions were made.

(1) Puller v. Staniforth, 11 East, 232 ; Same v. Glover, 12 East, 124.

The voyage being broken up it is a total loss.

The parties may agree in the policy what shall constitute a total loss,(1) but policies rarely contain any such agreement, nor does it seem to be expedient, in general, in policies upon the ship, since the parties cannot make any stipulations that will be more intelligible or more convenient in their operation, than are the general rules adopted upon this subject by the courts.

(2) Pole v. Fitzgerald, Willes, 641 ; 3 Brown's Parl. Cas. 131. Amb. 214.

It is a general rule that the assured on any subject may abandon, when the voyage is broken up, in respect to that subject, by the perils insured against. In regard to a policy upon a ship, this rule does not necessarily suppose the insurance to be upon a *voyage*. In the case of an insurance made in 1744, on a privateer, for the term of four months, to cruise from place to place; the crew mutined, and afterwards deserted within the four months, and carried away the boat, fire-arms, and cutlasses belonging to the privateer; the vessel, however, arrived safe at Jamaica. A total loss was claimed on the ground that the *voyage was lost*, though no specific voyage had been contemplated; and the court made no distinction between this policy, and one made on a vessel from one port to another. They were of opinion that the voyage was not lost, within the meaning of the policy.(2)

It seems to have been formerly considered, that in case the voyage, or even a cruise of a few months for which the ship was insured, was broken up and defeated by a peril insured against, the assured might abandon the ship, although it was in his possession, or subject to his control, at the time of abandonment, without being materially injured.

(3) Pond v. King, 1 Wilson, 191 ; S. C. Com. Rep. 360. See also Whitehead v. Bance, Park, 122 ; Jenkins v. McKenzie, Millar, 321 ; Jalabert v. Collier, Millar, 323 ; S. C. Beawes, tit. Ins. p. 311.

A privateer insured for three months, from the 1st of December 1744, free from average, and without benefit of salvage, was captured on the 2d of February 1745, by a French ship; and her guns were taken out, and 117 of her men were sent to France. After being in possession of the enemy three days, she was recaptured, and was soon afterwards carried into Lisbon. Chief Justice Lee, giving the opinion of the court, said, 'The assured paid his premium in consideration of the insurer's undertaking that the privateer should cruise safely during three months. It appears that the ship was taken and detained within that time, and that the assured was hindered from his cruise; and this by our law is a total loss.'(3)

(4) Ut Supr.

This doctrine continued to prevail until 1750, when it was overruled in the case of Pole v. Fitzgerald;(4) but afterwards, and when it could not be said still to subsist legally, very evident traces of it are discoverable in the language used by Lord Mansfield, in giving the opinion of the court on questions of total loss. The doctrine seems to have grown out of wagering policies; the policy was of this description in the above case.(5)

(5) Pond v. King, Ut Supr.

These were not strictly contracts of indemnity, though made respecting a real interest, and contemplating an actual loss. But the parties were considered to have in view only the success or failure of the adventure; if the ship did not arrive at the port of destination, or was prevented from cruising for the time specified, the insurer lost the wager. These were, therefore, insurances *upon the voyage or cruise*; but as Beawes justly remarks,⁽¹⁾ it is very unreasonable to apply this doctrine in putting a construction upon a contract strictly of insurance or indemnity. (1) P. 311.

Accordingly Chief Justice Willes shows, in an elaborate argument,⁽²⁾ that insurance is not *on the voyage*, that is, the insurer of the ship does not guaranty that she shall cruise for the time mentioned in the policy, or perform the voyage described, since the question as to loss under the policy is never, what damage has the assured sustained by the interruption of the voyage or cruise, whereby he may have lost great profits in a favourable market, or the opportunity of taking a rich prize; but how much damage is *done to the ship*. The policy is not *on the voyage*, but on the ship, *for the voyage or time specified*. Insurance is said to be on the ship *for the voyage*. (2) Pole v. Fitzgerald, Willes, 641.

Chief Justice Marshall explains the principle that insurance is 'on the ship *for the voyage*,' to mean, 'that the voyage shall not be destroyed by the fault of the ship, or in other words, that the ship shall be capable of making the voyage.'⁽³⁾ But he does not mean that the insurer must pay the assured all the damage he may sustain by reason of the ship's being disabled. The insurer contracts to pay the damage done to the ship by the specified perils, and if this damage exceeds half the value of the ship, or is so great as to render the ship incapable of prosecuting the voyage, or if the ship is taken out of the control of the assured, by any of those perils, he will take her off the hands of the assured, and pay the whole sum at which she is valued in the policy. (3) 4 Cranch, 377.

The claim of the assured is not however limited to the damage actually and specifically sustained by the body or tackle of the ship, and to cases of arrest by superior force, but extends to the situation into which the ship is thrown by the operation of the perils; and where the real facts, or the consequences, which will actually follow, cannot be known—as in case of a captured ship which may perhaps be acquitted, or of a stranded ship which may possibly be got off and repaired—the assured is entitled to act, in managing and disposing of the property, and also to claim of the underwriters, according to the facts as they appear to be upon the best examination that can be made at the time of taking measures in respect to the property, or of making abandonment to the underwriters. 'There is not any principle, says Lord Ellenborough, which authorizes abandonment, unless where the loss has been actually total, or *in the highest degree probable* at the time of the abandonment.'⁽⁴⁾ Mr. Justice Story says, 'these last words show that the right of abandonment does not always depend upon the certainty, but Where the absolute loss of the property is in the highest degree probable, the assured may abandon. (4) Anderson v. Wallis, 2 M. & S. 240.

(1) *Peele v. Merchants' Ins. Co. C. C. U. S. Mass. Oct. 1822. 2 Mason, **.* upon the high probability of a total loss, either of the property, or voyage, or both.'(1)
 (2) *4 Cranch, 46.* 'There are situations,' says Chief Justice Marshall, 'in which the delay of the voyage, the deprivation of the right to conduct it, produce inconveniences to the assured, for the calculation of which the law affords and can afford, no standard. In such cases, there is, for the time, a total loss.'(2)

'The right of abandonment,' says Mr. Justice Story, 'has been admitted to exist where there is a forcible dispossession or ouster of the owner of the ship, as in cases of capture,—where there is a moral restraint or detention which deprives the owner of the free use of the ship, as in case of embargoes, blockades, and arrests,—where there is a present total loss of the physical possession and use of the ship, as in case of submersion,—where there is a total loss of the ship for the voyage, as in case of shipwreck, so that the ship cannot be repaired in the port where the disaster happens,—and lastly, where the injury is so extensive that by reason of it the ship is useless, and the making repairs would exceed her value. The right to abandon exists whenever, from the circumstances of the case, the ship, for all the useful purposes of a ship for the voyage, is for the present gone from the control of the owner, and the time when she will be restored to him in a state to resume the voyage, is uncertain or unreasonably distant, or the risk and expense are disproportionate to the expected benefit and objects of the voyage.'

'If a shipwreck occurs without material injury to the vessel, so that she may be repaired in a reasonable time, at a reasonable expense, and resume her voyage, no right of abandonment attaches. Whether the right of abandonment exists or not, is to be judged of from all the circumstances of the case.'(3)

(3) *Peele v. Merch. Ins. Co. Ut Supr.*
 A loss of the cargo is not a breaking up of the voyage under the policy, in respect to the ship.

If the voyage be broken up by a loss of the cargo, this does give a right to abandon the ship. A ship insured, free from average and without benefit of salvage, with a stipulation that a total loss should be paid if she did not arrive at Marseilles, was captured by the Spaniards and carried into Ceuta; where it became necessary to dispose of the cargo, it being of a perishable nature. Both ship and cargo were finally released, but the cargo having been sold, there no longer remained any object for pursuing the voyage; and the ship accordingly did not arrive at Marseilles. It was held, however, that these circumstances did not give the assured any right to abandon.(4)

(4) *Kulen Kemp v. Vigne, 1 T. R. 304.*

In the case of a policy on ship and cargo from New York to Gibraltar, the ship was taken into Algeiras by the Spaniards, where the supercargo thought it advisable to dispose of the cargo, which he did under an order of court, procured at his instance. As to the right of making an abandonment under these circumstances, Mr. Justice Washington said, 'As to the cargo, the voyage was broken up, and the underwriters on that and the freight, are answerable. But this is nothing to the underwriter on the vessel. She was not detained a moment with a view to condemn. If the cargo had been landed immediately, there

was nothing to prevent her departure, she was in perfect safety, and free from the perils insured against.'(1)

A ship being insured from Charleston to a port in the Bite of Leogan, was taken by a French privateer and carried into the port of Mole St. Nicholas, where the cargo was taken by the French commandant for the use of the garrison, but the vessel was not detained. The assured claimed for a total loss, on the ground that the voyage had thus been broken up. Chief Justice Marshall, in giving the opinion of the court, said, 'It does not appear that the ability of the vessel to prosecute her voyage was in any degree impaired. Her cargo had been taken by the commandant at Mole St. Nicholas. But the policy is upon the vessel alone; and contains no allusion to the cargo. Had she sailed in ballast, that circumstance would not have affected the policy. The underwriters insure against loss or damage to the vessel, not the cargo. They insure her ability to perform the voyage, not that she shall perform it. If a partial damage had been sustained by the cargo, no one would have considered the underwriters as liable for that partial damage; why then are they responsible for the total destruction of the cargo? It is said, that by taking out the cargo, the voyage is broken up. But the voyage of the vessel is not broken up. By this construction, the underwriter of the vessel is made to undertake that the cargo shall reach the port of destination. To prosecute the voyage, it is said, had become useless, and therefore the engagement of the underwriters was forfeited, although this state of things was not produced by any fault of the vessel. If this be true, the contract, instead of being an insurance on the ability of the ship to perform the voyage; an insurance against the loss of the ship upon the voyage; would be a contract to purchase the vessel at the sum mentioned in the policy, if circumstances not produced by the fault or disability of the vessel, should induce the assured to discontinue the voyage after it had been undertaken.'(2)

'The insurer on the ship,' says Chief Justice Tilghman, 'has nothing to do with the cargo. He undertakes that the ship shall be sufficient for the performance of the voyage, and that he will make good any damage she may suffer in the course of the voyage. But he does not undertake that she shall *perform the voyage*, because the cargo may be lost, or other events may occur, which may render it unnecessary that she should perform it.'(3)

Stranding is not of itself considered to be, in all cases, a total loss of the ship. Whether it be so or not depends on the damage, the practicability of getting the ship afloat, and the expense and delay that will be occasioned by the attempt. In giving the opinion of the court, Chief Justice Parsons said, 'When the ship is stranded, the assured cannot, for this cause merely, immediately abandon. By some fortunate accident, by the exertions of the crew, or by extraneous assistance, the ship may be again floated, and rendered capable of pursuing the voyage. In such case the insurers are only answerable for the expense occasioned by the stranding and repairing the damage. But

(1) *Hurtin v. Phœn. Ins. Co. Condry's Marsh.* 601. n.

(2) *Alexander v. Balt. Ins. Co.* 4 Cranch, 370.

(3) *Ritchie v. Unit. Ins. Co. 5 Serg. & Rawle*, 501.

Stranding does not in all cases give the right of abandoning the ship.

undoubtedly, when by the stranding the voyage is defeated, the owner may abandon. And the stranding of the ship may prove the destruction of the voyage, either by her afterwards becoming a wreck, before she shall be put afloat, or by circumstances accompanying the accident. A ship may be stranded on a part of the coast, where no assistance can be procured to get her afloat, or where there may be no materials or workmen for repairing the damage; and in cases like this, the voyage is lost, and the assured may abandon. Or if the ship be stranded in a place where assistance, materials, and workmen may be easily procured, but it may be doubtful whether the attempt to get her off will succeed, while the expense is certain; the assured may abandon. If the stranding happen at a place, and in a season when the ship cannot be speedily got off, but the owner must wait so long for a favourable time, that the voyage is defeated, he is not obliged thus to wait, but may throw the loss on the insurers by abandonment.'(1)

(1) Wood v. Lincoln and Kennebeck Ins. Co. 6 Mass. Rep. 479.

'It is well known,' says Chief Justice Kent, 'that stranding is not *ipso facto* a total loss. It is a question of evidence, whether stranding be a total loss, either because it is followed by shipwreck, or other destruction of the property, or because the vessel cannot be set afloat, or because she cannot be repaired at the place of the peril, for want of workmen or materials.'(2)

(2) Patrick v. Com. Ins. Co. 11 Johns. 13.

In consequence of the captain's mistaking the lights, some of which had been erected after he sailed from the United States, a ship went on shore, with her head upon the rocks, on Gerrish's Island, near Portsmouth in New Hampshire, on the 2d of March, in a place surrounded by breakers, in a heavy swell, which caused her to strain very much, and thump, so that it was difficult to stand upon deck. She remained there until the time of the abandonment, when her bottom was broken in several places, so that the tide ebbed and flowed through her. The cargo was discharged, and the sails and rigging had been cut away from her masts, and all her furniture removed for safety, and she was deserted by the master and crew. The chance of getting her off was small, and the expense of undertaking to do it great, and if got off it would require three months to make the necessary repairs. Mr. Justice Story held this to be a total loss, though the expense of repairs should in the event prove to be less than half the value.(3)

(3) Peele v. Mer. Ins. Co. C. C. U. S. Mass. Oct. 1822. 2 Mason's Rep. **.

A ship attempting to go through Helgate, was thrown upon the rocks, her rudder and part of her keel knocked off, and one of her sides beaten in, so that the whole of her cargo, consisting of salt, was washed out and lost. It was held, that if the vessel in this situation was in imminent danger of being utterly destroyed, the assured might abandon.(4)

(4) King v. Middletown Ins. Co. 1 Connect. Rep. 184.

The ship being damaged so that she cannot be repaired at the place where she is, may be abandoned.

A ship, cargo, and freight being insured, free of average, for a voyage from Tortola to London, the ship met with bad weather the day after sailing, and on the following day the captain was obliged to return to Tortola, where, upon a survey, the ship was declared to be unfit to proceed upon the voyage; and she could not be repaired in any of the West India Islands. Accordingly

the voyage was broken up, and the cargo sold. The assured abandoned and claimed for a total loss. Lord Mansfield said, 'If by the perils insured against, the voyage be lost and gone, it is a total loss, otherwise not. The ship received an irreparable hurt within the policy, which drove her back to Tortola, where ships could not be had, capable of taking the cargo on board. The assured were not to wait till ships could be had. The insurance is that the ship shall come to London. Upon turning this case in every view the court are of opinion that the voyage was totally lost.'⁽¹⁾

(1) *Manning v. Newnham*, Park, 260; Marshall, 586; 2 Camp. 624. n.

It has been held, in New York, to be a total loss of the ship, if, by the perils insured against, she is rendered unfit to carry her original cargo, though she may be able to carry one that is lighter and more buoyant. The policy was on a ship from Batavia to New York, in the course of which voyage the ship was obliged to put away for St. Christopher's, where, after being twice surveyed, she was condemned and sold, as unfit to be repaired for the purpose of proceeding on the voyage. She afterwards carried a part of a cargo of rum and molasses to New York, and might have carried a full cargo of rum, which was more buoyant than the cargo brought from Batavia. Mr. Justice Radcliff, giving the opinion of the court, said, 'The question is not whether the vessel be in a capacity to be repaired, so as to prosecute her voyage with half or any other portion of her cargo, but whether she is capable of proceeding, or of being refitted to proceed, and carry the whole. A vessel is not seaworthy unless she be in a condition to carry a full cargo. The vessel was insured to perform her voyage, and carry her cargo, from Batavia to New York. This she was disabled from doing. The enterprise therefore failed by means of the perils insured against, and the assured has a right to abandon.'⁽²⁾

The ship rendered unfit to carry on her original cargo.

(2) *Abbott v. Broome*, 1 Caines, 292.

The ship being abandoned at sea by the crew, on account of sea-damage and the danger of navigating her, does not give the assured a right to abandon, after she is brought into port by other persons in a state to be repaired. A ship insured from Hull, in England, to New York, encountered storms on the voyage, and was deserted by her crew, and taken possession of by a part of the crew and passengers of another ship, and brought into Newport in Rhode Island, where she was libelled and sold for salvage. The owners resided in New York, and had notice of the arrival of the vessel, and that she was libelled for salvage; and they did not interpose to prevent a sale by the payment of the salvage. Chief Justice Abbott said, 'It appears to me that there was not a total loss until the assured allowed the ship to be sold under the decree of the admiralty, which they might have prevented, and it was their duty to have prevented, by paying the salvage. If it had appeared that they had used all the means in their power, and were still unable to pay the salvage, it would have been very different.' Bayley, J. 'The sale, in order to constitute a total loss, must have been found to be necessary, and wholly without the fault of the owners.'⁽³⁾

A ship being deserted by her crew is brought into port by others, and libelled and sold for salvage.

(4) *Thornely v. Hebson*, 2 B. & A. 513.

Where the ship is violently taken possession of by the crew, or the assured is otherwise dispossessed of her by superior force, and no abandonment is made until the force is withdrawn, and he has regained possession, the question of partial and total loss is determined by the degree of damage, the situation of the vessel, the means of making repairs, and the time requisite for this purpose, as in the case of sea-damage.

A ship being taken possession of by the crew, is recovered and afterwards sold by order of the assured.

A part of the crew of a slave ship having mutinied and taken possession of her, before any slaves were taken on board, allowed the officers and a few of the men to go on shore on the coast of Africa, and ordered the boatswain to navigate the ship to Cayenne, who pretended to enter into their designs, but instead of doing so, conducted her to Barbadoes, where she was taken possession of by a man of war. The government agent at that place, took charge of the ship, and found it necessary, without waiting for orders from the owners, to dispose of the whole of the cargo and stores. On receiving intelligence of what had happened, the assured abandoned to the underwriters, and at the same time wrote to the government agent to forward 'the sales, and a remittance of the proceeds of the ship and cargo.' In pursuance of this letter he sold the hull of the ship. The underwriters maintained that this was not a total loss of the ship. Lord Eldon said, 'he was of opinion that the assured were entitled to abandon.'⁽¹⁾

(1) *Brown v. Smith*, 1 Dow, 349. See *Pole v. Fitzgerald*, Wiles, 641; 4 Bro. P. C. 439. Supr. 390.

A ship being taken possession of by the crew and carried far out of the course of the voyage, is afterwards recovered.

While the master of a ship on the coast of Africa was on shore, the crew took possession of the ship, and sailed with her to South America. After plundering the cargo, they all, except one black man, deserted her; and she was taken possession of by a part of the crew of a privateer, and carried to England, without having, in the mean time, sustained any material damage. On her arrival there, the owner having then the first intelligence of the interruption of the voyage, and hearing at the same time of her arrival in England, abandoned to the insurers. This was held not to be a total loss.⁽²⁾

(2) *Falkner v. Ritchie*, 2 M. & S. 290.

If the voyage has been broken up by the capture, the assured may abandon notwithstanding a recapture.

If a captured ship be recaptured by a friend, the recapture takes away the right of abandonment as far as it depended on restraint and detention merely; and the right will then, as in the case of sea-damage, depend upon the degree of injury sustained in consequence of the capture.⁽³⁾

(3) *Queen v. Union Ins. Co.* Wharton's Dig. 335. h. t. No. 169.

A privateer having been captured and recaptured, was carried into Boston; where no person appearing to pay salvage, she was condemned and sold, and a moiety of the proceeds paid to the recaptors, and the surplus remained in court. Lord Hardwicke said, 'It is uncertain whether the assured will receive any thing or not; if any thing is recovered, he must be allowed his expenses. Therefore I take it, when he is willing to relinquish his interest in the salvage, he ought to recover the whole money insured.'⁽⁴⁾

(4) *Pringle v. Hartle*, 3 Atk. 195.

A ship insured from Newfoundland to her port of discharge in Portugal, Spain, or England, was captured by the French, and after being in their possession eight days, recaptured and brought into Milford Haven, but the master, mate, and all the

sailors, except an apprentice and landsman, had been taken out by the captors and sent to France. Before being captured, the ship had been so injured in a storm as to be unable to keep up with the convoy, and could not have proceeded on her voyage without going into port to refit. A part of the cargo had been thrown overboard in the storm. An abandonment was made as soon as the assured had news that the vessel was brought into Milford Haven. In giving the opinion of the court, Lord Mansfield said, 'The loss and disability was in the nature of total, when it happened. During eight days the assured was certainly entitled to be paid by the insurer as for a total loss. The subsequent recapture is at least a saving only of a small part; half the value must be paid for salvage. The disability to pursue the voyage still continued. The master and mariners still were prisoners. The charterparty was dissolved. The freight, except in proportion to the goods saved, was lost. There might be circumstances under which a capture would be but a small temporary hindrance to the voyage; perhaps none at all: as if a ship were taken, and in a day or two escaped entire and pursued her voyage. There are circumstances, under which it would be deemed an average loss, as if a ship taken is immediately ransomed. But here the loss was total at the time it happened. It continued total as to the destruction of the voyage. A recovery of any thing could be had only by paying more than half the value. In such case there is no reason to say that the assured might not disentangle himself from an unprofitable trouble and further expense, and leave the insurer to save what he could.'(1)

(1) *Goss v. Withers*, 2 Burr. 683.

Lord Ellenborough, speaking of the preceding case, said, 'I must say that there is a looseness and generality in the expressions which makes one pause upon it. What has a loss of the voyage to do with the loss of the ship?'(2) By loss of the voyage Lord Ellenborough here means that of the cargo, or the interruption of the adventure, but without the continuance of any actual restraint upon the ship.

(2) *Falkner v. Ritchie*, 2 M. & S. 293.

A ship and cargo insured from Virginia to London, were captured by a French privateer, in May 1760, and the captain and all the crew were taken out, except the mate and one man. The vessel was recaptured and carried into Plymouth, one month after the capture. Neither the ship nor cargo had received any damage by the capture. The assured abandoned on hearing of the loss. Lord Mansfield, in giving the opinion of the court, on the question, whether this was a partial or total loss, said, 'Every question of this kind must depend on the particular circumstances. It does not necessarily follow that because there is a recapture, therefore the loss ceases to be total. If the voyage is absolutely lost, or not worth pursuing; if the salvage is very high; under these, and many other like circumstances, the assured may abandon. But in the present case the voyage was so far from being lost, that it had only met with a short temporary obstruction; the ship and cargo were both entirely safe; the expense incurred did not amount to near half the value.

The only argument to show that the loss had not ceased to be total, was built upon a mistaken supposition, that the recaptor had a right to demand a sale, and to put a stop to any other prosecution of the voyage. But that is not so. The property returned to the assured, pledged to the recaptors for one eighth of the value, as salvage. Upon paying this, the owner was entitled to restitution: the recaptor had no right to sell the ship. If they differed about the value, the court of admiralty would have ordered a commission of appraisement. It is most clear that the ship had sustained no other loss, by reason of the capture, than a *short temporary obstruction*. Whatever undoes the damnification in whole or in part, must operate on the indemnity in the same degree. It is a contradiction in terms to bring an action for indemnity, when, upon the whole event, no damage has been sustained. It is impossible that a man should desire to abandon in a case circumstanced like the present, but for one of two reasons, viz. either because he has overvalued, or because the market has fallen. The only reasons which can make it the interest of the party to *desire*, are conclusive *against allowing it*.⁽¹⁾

(1) *Hamilton v. Mendes*, 2 Burr. 1198.

Lord Mansfield afterwards said, 'I took great pains in delivering the opinion of the court in *Goss v. Whithers*, and *Hamilton v. Mendes*. I think, that from those cases the whole law between insurers and assured, as to the consequences of capture and recapture, may be collected.'⁽²⁾

(2) *Doug. 232*.

In a case that occurred in 1779, an English ship and freight being insured from Montserrat to London, the ship was captured by two American privateers, that took out the crew and a part of the cargo, and the rigging; she was afterwards recaptured and carried into New York, which was at the time occupied by the British forces. A part of what cargo had been left on board, was found to be damaged; the vessel was leaky, and could not be repaired without being entirely unloaded; and the only means of paying the salvage, was by the sale of a part of the cargo that remained. The expenses of repairing would have exceeded the freight by more than 100%. and no sailors were to be had. Under these circumstances the master sold the cargo and left the vessel at New York. The assured abandoned, and it was held he had a right so to do. The opinion of the court upon this case was given by Lord Mansfield. He said, 'The present question is singly this, whether the consequences of the capture were such, as, notwithstanding the recapture, occasioned a total destruction to the voyage, or only a partial stoppage? No cases say, that the bare existence of the hulk of the ship prevents the loss being total. The point is, what did the owner suffer by the capture? and it appears that he suffered so much, that it was not worth while to pursue the voyage. The whole voyage was lost.'^(a)

(a) *Milles v. Fletcher*, Doug. 231. Lord Mansfield cites *Spencer v. Franco*, before Lord Hardwicke in 1735, on the same question, 2 Burr. 1211.

Chief Justice Dallas says, that the principle upon which this case was decided has been confirmed by all the subsequent cases.⁽¹⁾ But of this there seems to be some question. There are few cases in which the right of abandonment is extended to a similar state of facts; and the reasoning of Lord Mansfield, and the general doctrines laid down by him in this case, are evidently drawn from the principles relating to abandonment for a loss of the voyage under a wagering policy; and he cites decisions made upon such policies, in support of his opinion.

At the trial of the above case of *Milles v. Fletcher*, Lord Mansfield told the jury, 'That if they were satisfied the captain had done what was for the benefit of all concerned, they must find for a total loss. Whatever was right for him to have done, if it had been his own ship and cargo, the underwriter must answer for the consequences of it.'⁽²⁾ In a subsequent case, of a claim for a total loss of the freight, the vessel having been stranded, and in that condition sold by the captain who considered her situation to be desperate; it was argued on behalf of the insurers that the captain did not act for the benefit of *all* concerned, in selling the ship, since the underwriters on freight could not be benefited. Chief Justice Dallas said, 'A distinction in this case has been attempted to be drawn between the meaning of the words, *for the benefit of all concerned*, and the words, *with a view to the benefit of all concerned*; but this seems to be a distinction without a difference. The expression, *acting for the benefit of all concerned*, means with a view to that benefit, and not what the consequence of the act may prove. It has been said, what has been done could not be for the benefit of the insurer on freight, which must be lost by this proceeding. But the master is to look to the chief general interest, that is, the ship and cargo; and it would be strange to say that he must suffer those to prove a total loss to the assured or the insurer, because, by abandonment or sale, the insurer upon freight may have a loss, as depending upon freight, cast upon him.'⁽³⁾

A vessel insured from Kingston, in Jamaica, to Alexandria in Virginia, was captured by Spaniards, and all her men taken out except two, and three days after recaptured by a British sloop of war, and carried back to Kingston, where she was libelled for salvage, the rate of which, in such case, is limited by the British statute to one eighth of the value. The vessel's register had been lost by the capture. She was sold to pay this salvage. It was objected on behalf of the underwriters, that the assured ought to have raised funds to pay the salvage instead of permitting the vessel to be sold. On the question, whether this was a partial or total loss, Chief Justice Marshall said, 'It is true, that a case of capture and recapture will not of itself sanction an abandonment. Yet, it is equally true that, in case of capture, a recapture will not deprive the party of his right to abandon. The consequences of the capture and recapture, the effect produced upon the fate of the voyage, must govern the right of the parties. The effect is always a matter of evidence, and must rest much in the discretion of a jury.'

(1) *Idle v. Roy. Ex. Ass. Co.* 3 Moore, 155.

If the captain acts for the benefit of all concerned, the insurers are liable for the consequences.

(2) Doug. 231.

(3) *Idle v. Roy. Ex. Ass. Co.* 3 Moore, 133.

(1) *Mar. Ins. Co. of Alex. v. Tucker*, 3 Cranch, 357. See *Parage v. Dale*, 3 Johns. Cas. 156.

Whether the ship may be abandoned after arriving at the port where the risk ends.

(2) *Parage v. Dale*, 3 Johns. Cas. 158.

(3) *Ralston v. Un. Ins. Co.* 4 Bin. 386.

(4) *Peters v. Phœn. Ins. Co.* 3 Serg. & Rawle, 25.

The right to abandon depends upon the facts at the time of abandoning, not upon subsequent events.

(5) *Peele v. Merch. Ins. Co. C. C. U. S. Mass.* Oct. 1822. 2 Mason, 22.

(6) *Fontaine v. Phœn. Ins. Co.* 11 Johns. 295. See also *Wood v. Lin. & Ken. Ins. Co.* 6 Mass. Rep. 483.

Washington, J. 'Whether the assured had a right to abandon, was a question dependent upon the fact, whether the voyage was broken up and not worth pursuing.' Cushing, J. 'Strong circumstances are stated, that show the voyage could not be safely pursued, or could not be pursued at all, in consequence of the loss of the register, and loss of hands by the capture.' (1)

It is said by Mr. Justice Radcliff, of New York, speaking of a policy upon the ship, 'I know of no case in which the assured can abandon after the voyage is completed, and he is informed that it is so.' (2) But there appears to be no reason why the ship may not be abandoned at the port of destination, if she arrives there in a disabled state, not capable of being repaired, or not worth repairing. The above remark of the judge must be considered in reference to the particular case under consideration, which is one of capture and compromise with the captors, in which the insurers offered to pay the expenses of the compromise. In a case that occurred in Pennsylvania, a total loss was claimed under a policy on a ship that had arrived at the port to which she was insured, and no objection was made on this account merely. (3)

In a subsequent case that occurred in the same state, the insurers were held to be liable for a total loss of a ship that had arrived at her port of destination, on account of damage exceeding half of the value. Mr. Justice Yeates said, 'If the vessel received her death wound during the voyage insured, it was of no moment when the loss was ascertained, although subsequently to her arrival at the port of destination.' (4)

The right to abandon on account of the stranding of the vessel or other sea-damage, does not necessarily depend upon the facts as they are finally ascertained. Where a stranded ship was subsequently got off and repaired, Mr. Justice Story said, 'We are not to judge of this case by subsequent events, except so far as they operate by way of evidence upon the preexisting state of the ship. The right of the abandonment depended altogether upon the facts as they were, and the conclusions which reasonable men ought then to have drawn from them in the exercise of sound discretion. The right of abandonment cannot be in suspense, or be devested by subsequent events. The whole reasoning of courts of law, in cases where it has been decided that abandonment must be made in reasonable time after knowledge of the loss, demonstrates that the assured is to act, not upon certainties, but upon probabilities, and that if he should wait till an unfavourable result, he will not then be entitled to turn the loss into a technical total loss.' (5)

In respect to an abandonment of a ship which had been stranded at Martinique, and was sold by the master, without any attempt being made by him to get her off, Chief Justice Thompson told the jury, that 'the case at the time appeared desperate, and the good fortune of the purchasers,' in getting the vessel afloat, 'could not destroy the right of the assured; and that if the transaction was honest, and a sound discretion was exercised in selling the vessel, the insurers were liable for a total loss.' (6)

So in case of a ship which, to prevent her from sinking, was purposely run upon the rocks in the St. Lawrence, where she was exposed to the full force of the current, and the bodies of ice drifting down the river, and was sold by the captain as she lay, after surveys, and with the consent of one of the owners, who was the agent of the others; though she was afterwards got off, and performed the homeward voyage with another cargo, yet it was held to be a total loss of the freight; for the captain acted *bona fide*, and for the benefit of all concerned, according to the circumstances as they appeared at the time upon the best examination that could be made.(1)

(1) *Idle v. Roy. Ex. Ass. Co.* 3 Moore, 115.

It is a general rule that if the ship or goods insured, be damaged to more than half of the value, by any peril insured against, the assured may abandon, and recover for a total loss.(a) But the assured must abandon for this cause before making the repairs. He cannot proceed to repair, and abandon after the repairs are made, at however great an expense. A ship, upon a voyage from Messina to Boston, sustained sea-damage, which made it necessary to put into Lisbon, where the master had her repaired at an expense exceeding half of her value, as the assured alleged; and the vessel was bottomried for the expense. The assured abandoned in Boston immediately on hearing of the accident, which intelligence they received about three or four days before the vessel arrived at Boston. On the arrival of the vessel she was sold under a process instituted upon the bottomry bond, and the proceeds of the ship and freight were not sufficient to satisfy the bond. A bill had also been drawn on London by the master on account of the expense of repairs, which was not paid. Mr. Justice Story held that this was a partial loss. He said that the assured by electing to repair lost his right to abandon.(2)

If the damage exceed half the value, the ship may be abandoned.

(2) *Humphrey v. Un. Ins. Co. C. C. U. S. Mass. May, 1823. See Coolidge v. Glouc. Mar. Ins. Co. 15 Mass. Rep. 341. Contra.*

Chief Justice Parsons considered damage to the ship, exceeding half her value, to be a constructive shipwreck. He says, 'When the ship becomes a wreck by any of the perils insured against; it is generally a total loss. The ship becomes a wreck when, in consequence of the injury she has received, she is rendered absolutely unable to pursue the voyage without repairs exceeding the half of her value.'(3)

(3) *Wood v. Lin. & Ken. Ins. Co. 6 Mass. R. 482.*

In applying this rule, the question occurs, whether the real value of the ship, for which she might be sold, is intended, or the value in the policy, and which would be recovered in a total loss? This question does not appear to have been particularly considered by the English courts, where this rule seems not to have been very frequently applied to cases of loss upon the ship.

Whether this rule refers to the value in the policy.

In giving an opinion upon this question, Mr. Justice Story says, 'In what respect does the case of the ship differ from the case of the goods, as to the ascertainment of the damage? Can

(4) *Cazalet v. St. Barbe, 1 T. R. 187.*

(a) *Le Guid. c. 7. s. 1; 2 Valin, 99. h. t. a. 46. n.; Goss v. Withers, 2 Burr. 683; Hamilton v. Mendes, 2 Burr. 1298; Clarkson v. Phoen. Ins. Co. 9 Johns. 1; Waddel v. Col. Ins. Co. 10 Johns. 61; Queen v. Un. Ins. Co. Wharton's Dig. 335. h. t. No. 169.*

the valuation in the policy be a more correct guide in the one case than in the other? The question in each case is necessarily the same; what is the present value of the property compared with its value before the injury? and, for the same purpose; to fix the extent of the damage sustained by the accident. One should suppose that this was the true measure of the damage in all cases in which it is attainable. The valuation in the policy cannot, in the case of the ship any more than of the goods, measure the proportion of the damage, because the value may in the mean time have essentially changed. And yet it is that proportion which is the object of the inquiry. The law deems the ship worth repair, unless injured more than half her value. At what time? Surely at the time of the injury.'(1)

(1) *Peele v. Merch. Ins. Co. C. C. U. S. Mass. Oct. 1822. 2 Mason, 20.*

(2) *Fontaine v. Phœn. Ins. Co. 11 Johns. 293. See also Dupuy v. Unit. Ins. Co. 3 Johns. Cas. 182; Depeyster, v. Col. Ins. Co. 2 Caines, 85; Smith v. Bell, 2 Caines' Cas. 153; Coolidge v. Glouc. Mar. Ins. Co. 15 Mass. Rep. 134.*

The value of the ship in the policy has been sometimes assumed, but without any particular consideration of this point. It seems to have been taken for granted, in most cases, that if the expense of repairs would exceed half of the value before the injury happened, or after it was repaired, the assured might abandon.(2)

In regard to the application of the rule to a loss upon goods, it would make no difference whether the value were taken at one place or another, unless it applied to different kinds of goods, the relative value of which should be different at different places. If the insurance is upon one kind of goods only, the same loss or damage will amount to half of their value, whether they are put at a high or low estimate; since the amount of the damage varies with that of the value of the goods. Where the value of different kinds of goods insured in one policy, varies at the same rate at different places, the result will be the same as to partial or total loss, in reference to whatever place the value is assumed. In very many instances, therefore, this question cannot arise in respect to goods. And since the rule does not appear to have been actually applied to a loss upon goods, according to any estimate which would lead to a result different from what would follow taking the value in the policy, the application of the rule to a policy upon goods seems to afford very little ground for any inference in regard to its application to a loss upon the ship.

If this rule has relation to the value, at the time of the accident, it is one exception, and I believe the only one, to the principle, that the rights and liabilities of the parties, as far as they depend upon the value of the subject, shall be determined by the value agreed upon impliedly in an open policy, and expressly in a valued policy. It is said that the ship may be abandoned when, in consequence of damage by the perils insured against, she is not worth repairing; and a ship is considered not to be worth repairing, of which the repairs would cost more than half of her value when repaired. If this value be estimated at a high rate, she is worth repairing, when she is not so, if estimated at low rate. It would often be for the interest of the insurers that the vessel should be repaired at an expense exceeding half of her value, at a higher estimation by fifty per cent

than that made in the policy ; since, in her damaged state, she may not sell, at the place where she happens to be, for one quarter of the sum at which she is valued in the policy. But the rule ought to be so applied as to give the right of abandonment only in cases where the vessel is not worth repairing, in respect to one party, any more than in respect to the other. As her being worth repairing or not, depends upon the value at which she is estimated, it seems to be just to assume the basis of the calculation upon which the parties have agreed in their contract. This as between them is the real value, since it is the sum to be paid for the ship in case of her being totally lost. The reason is the stronger in favour of this construction of the rule, since the only motive for making an abandonment, instead of repairing, where the preference depends wholly upon the expense of the repairs, is, that the vessel is overvalued ; and a right of the assured, which is supported only by this reason, is very doubtful.

In case of repairs made by the assured, he can recover from the underwriters only two thirds of the expense ; one third being deducted on account of the new materials. In estimating the expense of repairs, to determine whether the loss is partial or total, it has been made a question, whether the one third is to be deducted, or whether two thirds of the expense of the repairs must exceed one half of the value, in order to entitle the assured to abandon. It was the opinion of the supreme court in New York, that ' the rule has no reference to the distinction of *new for old*. It is the actual expenditure or damage, that is taken into view, and on the abandonment, the insurer has the benefit of the repairs.'⁽¹⁾

Whether two thirds of the expense of repairs must exceed half of the value, to give the right of abandonment.

(1) Dupuy v. Unit. Ins. Co. 3 Johns. Cas. 182.

A majority of the court of errors were of a different opinion. Chancellor Lansing, giving the opinion of that court, said, ' as the deduction is professedly made on the principle, that the value of the subject has been enhanced to that amount, that deduction ought to be made before the test of total loss or not is applied ; for the doctrine of technical total loss is expressly founded on the position, that the subject assured has been deteriorated more than one half.'⁽²⁾

(2) Smith v. Bell 2 Caines' Cas. 153.

Mr. Justice Story, in giving his opinion upon this question, said, ' If the deduction of one third could be made, I should have no doubt that the like deduction must be taken from the whole value of the ship after the repairs, in order to bring her down to the standard of value existing at the time of the stranding.'⁽³⁾

(3) Peele v. Merch. Ins. Co. Supr.

According to this mode of computation, if the expense of repairs is 2000 dollars, and the value of the ship when repaired 4000 dollars, it is not a total loss ; for after deducting one third of the expense of the repairs from each of these sums, the remainder of the expense of repairs is less than one half of the remainder of the value. If the two positions, that deterioration to more than half the value is a total loss, and that the value is to be considered as between the parties to be enhanced to the amount of one third of the expense of the repairs, be correctly

assumed by the court in the above case,—and of this there seems to be no question,—it affords very strong reasons in favour of this mode of computation. By this rule, to entitle the assured to abandon, the whole expense of repairs, without the deduction of new for old, must exceed three fifths of the whole value of the ship when repaired; and two thirds of the expense of repairs must exceed one half of the value of the ship before the injury.

(1) See *Dupuy v. Unit. Ins. Co.* 3 Johns. Cas. 182; *Peele v. Merch. Ins. Co.* cited *Supr.*

The reasons alleged against the deduction of one third before applying the rule are, (1) that 'the rule has no reference to the distinction of new for old;'—that 'on abandonment the insurers will have the benefit of the repairs;'—that 'no case in England has ever recognised any such deductions; yet some of the cases seemed to call for some expression in its favour, if it existed;'—that 'it must operate with great inequality, and introduce into the rule an element, sometimes of injustice, and generally inconsistent with its professed design;'—that 'the object of the rule is to ascertain whether the ship be worth repair, and it decides that if the injury exceeds half the value she is not worth repair;' and that the value is not in fact enhanced by the repairs.

These are the leading reasons against deducting the third. But it is said, in answer, that the insurer has nothing to do with the third, any more than he has with any other expense incurred by the assured, until the right of abandonment accrues; and when the rule refers to an expense exceeding half of the value, it necessarily has reference to an expense to which the insurer is a party. The object is to distinguish a partial from a total loss; and when this is done by the amount of expense, what can be meant but the expense for which the insurer is liable in partial loss? If the third is not to be deducted, the rule would be, that if a partial loss, in case of repair of sea-damage, would exceed two fifths of the value of the property, the assured may abandon.

Assuming that the third is deducted for the enhanced value, after the repairs are made, it follows that the ship is not damaged to half the value, unless two thirds of the expense of repairs amount to half of the value, for these two thirds only go to repair the damage, the other third being, by universal usage, regarded as an enhancement of the value. Whatever may be the fact, since it is assumed as a rule generally applicable in partial losses, that the value is enhanced by one third part of the expense of repairing, this seems to afford a very strong reason against adopting a rule in total losses which is directly inconsistent with this.

In regard to the reason that the insurers have the advantage of the enhancement of value by the repairs made after abandonment for sufficient cause, it does not seem to be strictly applicable, since whatever additional value they might give the ship by repairs and improvements, this certainly cannot be of any weight in determining whether she had been damaged to more than half of her previous value.

It is a reason for deducting the third that an abandonment of the ship, whether under an open or valued policy, operates in the greater number of instances as a sale of it at a high price. The argument drawn from the inequality in the operation of the one or other construction, seems, for this reason, to be quite as strong in favour of making the deduction.

The estimation of the expense, to determine whether it exceeds half of the value, includes, not merely the expense of repairs, but also that of getting the ship afloat, and all other expense attending the disaster, for which the insurer would be liable. Mr. Justice Story even says, the repairs of rigging, &c. injured by wear and tear, and of decayed timbers, are to be included.⁽¹⁾ But this must evidently depend on the insurer's liability to pay these charges in a partial loss, for upon any other principle the assured might abandon for injury exceeding half the value, for no part of which the insurer is liable.

(1) *Peele v. Merch. Ins. Co. Supr.*

A decision in New York is cited upon this subject. At the time of sailing on a voyage from New York to Curraçoa, the vessel's 'bottom was a little worm-eaten, but she was a staunch, tight, and strong vessel.' She was compelled to put into Kingston, in a damaged state, where, in the opinion of the master and other masters of vessels, it would have cost more than her value to repair her; and she was accordingly sold, and the assured upon her abandoned to the underwriters. A question was made, whether the repairs rendered necessary on account of the vessel's being worm-eaten, should be included in the estimate of the expense of repairs, by which the loss should be determined to be partial or total.

The jury were told, 'that if, in calculating the repairs, they believed any were necessary, on account of injuries received from worms prior to the vessel's sailing, the expense of such repairs should not be included in the estimate.' And Mr. Justice Livingston gave the opinion of the court, that this direction to the jury was wrong. He cited Millar,⁽²⁾ for the doctrine, that the underwriter 'is responsible for pre-existent defect, unless it goes so far as to make the ship not seaworthy.'^(a) Mr. Justice Livingston proceeds, 'It may seem hard to hold an insurer liable for the defective nature of the thing insured; but so long as the subject is seaworthy, is it not a part of his contract, that in case of accident he will defray all the expense of placing her in *statu quo*. If she be injured, the repairs being rendered necessary by a peril insured against, they ought to be made, without any other examination as to her antecedent state, except to determine the fact of her being seaworthy. I adopt as a general rule, that if the old injuries are not such as to render the vessel innavigable, no deduction is to be made on that account from the cost of repair.'⁽³⁾

(2) p. 136. n.

(3) *Depeyster v. Col. Ins. Co.* 2 Caines. 85.

(a) See also *Manning v. Newnham*, Millar, 303. cited by General Hamilton, for the assured, which, however, Mr. Justice Livingston says, 'proves nothing either way.'

This case cannot mean, that if a ship strike a rock and break some of her planks and timbers, the insurers are liable to pay, not only for the repairs of such damage, but also for repairing or replacing other parts of the ship, which may have been worn out, or have decayed, either before or subsequently to the commencement of the risk. Millar, in the passage cited, is attempting to make a distinction as to the liability of the underwriter for 'the natural and expected deterioration of the subject, and its pre-existent, though latent, defect.' The passage is obscure, and it is not easy to extract from it any definite practical doctrine. It certainly does not serve to elucidate the above case.

The doctrine intended in this case must be, that if worm-eaten timbers are broken or injured by the perils insured against, still the insurers shall pay for the repairs, although it would have been necessary to have made the repairs very soon, had no damage happened in consequence of these perils. In many instances the qualities of the subject, and the use to which it is put, or the ordinary accidents incident to it in the situation in which it is placed, may concur with the perils insured against in producing damage; still, if the damage can be satisfactorily attributed to the operation of those perils, the insurers are liable, unless they are discharged by some fault or stipulation of the assured.

Whether the offer of the insurers to pay the expense of repairs, takes away the right of abandonment.

(1) 2 Burr. 1209.

(2) *Da Costa v. Newnham*, 2 T. R. 407.

(3) *Wood v. Lin. & Ken. Ins. Co.* 6 Mass. Rep. 484.

(4) *Hart v. Del. Ins. Co. Condry's* Marsh. 562. n.

It is intimated in some few instances, that the underwriters may, by their own acts, in refusing or offering to advance funds, or meet expenses, determine the loss to be partial or total. Lord Mansfield mentioned, among the reasons for considering a loss to be partial, that 'the insurer undertook to pay all charges and expenses the assured should be put to by the capture.'⁽¹⁾ And where the assured was disposed to make an abandonment, but the underwriters dissuaded him, and the vessel being repaired, performed the voyage, but was sold to satisfy the bottomry bond given on account of the repairs, the underwriters refusing to take up the bond, the court considered their refusal as of importance in determining the amount of the loss, and were of opinion that they should pay the whole sum at which the vessel had been insured, since in consequence of the bond's not being taken up, the vessel never came to the use of the assured.⁽²⁾

Chief Justice Parsons, in giving the opinion of the court on the question of partial or total loss, in case of stranding, said, 'If the underwriter will engage to pay all the expenses, [of an attempt to recover and repair the ship,] whatever may be the event, the owner cannot abandon, until he has used reasonable endeavours to recover his ship, and has eventually failed.'⁽³⁾

Mr. Justice Washington adopted this doctrine. He was of opinion that, 'If the vessel was injured more than one half her value, the assured had a right to claim for a total loss, unless the underwriter offered to pay the amount of repairs at all events.

But he must engage to pay what may be necessary to fit the vessel to prosecute the voyage, although it may exceed what he would otherwise be liable for.'⁽⁴⁾

The court in Pennsylvania was of a similar opinion. They said, 'If the insurer will undertake to repair the damage, though exceeding one half the value, he may do it, and the assured shall not abandon; because, if the ship is repaired, it is all he has a right to demand.'⁽¹⁾

Mr. Justice Story is of a different opinion. He says, 'If in a doubtful case, when the expense of repairs must be great, though not with certainty one half, or where, by stranding, and the delay consequent thereon, the voyage may be, but not, in all probability, must be, lost; if the underwriters offer to bear all the expenses of the experiment, there seems to be some reason for admitting such an offer as a material ingredient in considering whether the owner has a right to abandon. This comports with the doctrine, as I apprehend it, in the English authorities. But the offer itself has never been relied on to defeat an indisputably vested right of abandonment. I know of no judgment where it has been held, that in a case of capture, or embargo, or blockade, the right to abandon can be intercepted by an offer to indemnify and pay all the expenses; if it could be, then an abandonment in all such cases would be perfectly nugatory, for the policy always imports, on the part of the underwriter, an agreement to this effect. And yet if the principle be correct, I do not perceive why it is not as applicable to a case of capture as of sea-damage; to a case of blockade, as of shipwreck. It appears to me to be introducing a new element of discord into the law of insurance, to allow the right of abandonment to be a shifting right, dependent on the will of both of the parties, and to be defeated by the act of one, after it has rightfully attached by the act of the other. And I am yet to learn how it is that an offer, made at the time of the abandonment, to pay all expenses, can have more efficacy than the same offer incorporated as it is in the original terms of the policy. The assured may in all cases elect to repair the damage at the expense of the underwriter.'⁽²⁾

Mr. Justice Smith, of Connecticut, commenting upon this doctrine, says, 'It contradicts the whole current of authorities to permit any subsequent transactions to remove the legal effect of abandonment rightly made at the time, except the agreement of the parties. Nor can I admit that the refusal of the insurer to advance money, or undertake to defray the expense, will in any case turn a partial loss into a total loss.'⁽³⁾

In considering the subject of total loss, whether of the ship, freight, or cargo, a question has occurred as to the authority of the master to sell the ship or cargo. This question may arise respecting a ship or cargo not insured; and it occasionally has so arisen. If we assume the position of Lord Mansfield, that 'Whatever was right for the captain to have done, if it had been his own ship and cargo, the underwriter must answer for the consequences of it,'⁽⁴⁾ we shall consider the acts of the captain, as far as the underwriters are concerned, to be of the same force, and to induce the same rights and liabilities between the parties to the policy, as if the sale of the property had been

(1) *Ritchie v. U. S. Ins. Co. 5 Serg. & Rawle, 509.*
See also *King v. Middletown Ins. Co. 1 Connect. Rep. 231.*

(2) *Peele v. Merch. Ins. Co. C. C. U. S. Mass. Oct. 1822, 2 Mason, 44.*

(3) *King v. Middlet. Ins. Co. 1 Conn. Rep. 237.*

As respects the insurers, the acts of the master in selling the property, are the acts of the assured.

(4) *Milles v. Fletcher, Doug. 231.*

The consequences of acts of the master done within the authority conferred by the occasion, are considered to be direct consequences of the peril producing the occasion.

made, or any other act in question done, by the assured himself.

The assured, who is supposed to be the owner of the ship and cargo, for our present purpose, can sell them ; but because he has that power and uses it, or confers it upon the captain to be used, it does not follow that the insurers are to be thereby affected. If therefore the master, as such, had power to make a valid sale of the ship or cargo at any time, and under any circumstances, the question would still arise whether the sale should be considered to be made on behalf of the insurers as well as others. But since the master, as such, does not possess this power, he can acquire it, if at all, only by the force of circumstances ; and the position assumed is, either that the same circumstances which would authorize him to give a purchaser a valid title to the ship or cargo, or the salvage of either, will of themselves constitute a total loss, and give the right of abandonment of the subject sold, whether ship or cargo ; or, else, that they will make the acts of the assured, or his agents, binding upon the underwriters, as acts done under the operation of the peril, and being one of its direct consequences, and therefore if by these acts, even though injudiciously done, the loss is made total, the underwriters are answerable.

These two principles are blended and confounded, more or less, in the cases on this subject, it being in some instances maintained that the acts of the master are binding upon the insurers, because the circumstances constitute a total loss, and in others, that the loss is total, because the extraordinary circumstances give the assured, or his representative, the master, authority to act in behalf of all concerned, and makes his acts binding upon them. These two modes of reasoning are just, in reference to different cases, and they may be applicable in different respects to the same case, which make the investigations upon this subject complicated and difficult, and not unfrequently involves the reasonings and opinions of judges in some obscurity. But in regard to the particular act of selling, only the first mode of reasoning seems to be properly applicable.

As far, therefore, as the state of the property insured, and the degree of the loss, are affected by the acts of the captain, it must appear, in order to make the insurers liable, that he has acted fairly, and for the interest of all concerned ; and also that he has acted within the limits of his duty and discretion as master, or within the authority necessarily conferred upon him by the extraordinary circumstances consequent upon the operation of perils insured against. As far as he exceeds these limits the insurers are not answerable for the consequences of his acts.

The assured cannot abandon because a sale of the property has made the loss total.

The captain may, in case of necessity for so doing, sell the ship or the cargo. But what is a case of necessity, and what is not so, depends upon the particular circumstances, and is a question of fact to be determined by a jury. In respect to the liability of the underwriters, however, it is more generally at least, and I believe without exception, assumed, that they are not affect-

ed by a sale of the property insured, unless it is made in consequence of events which constitute a total loss. The assured abandons, therefore, not because the sale has given the right, but because the events which induced the sale had occasioned a total loss.

It never has been questioned, that the master may hypothecate the ship or cargo, for the purpose of raising funds which are absolutely necessary in order to enable him to prosecute the voyage, and which cannot be otherwise procured. Chief Justice Hobart said, he 'was of opinion clearly, that if a ship be at sea, and take leak, or otherwise want victuals, whereby either herself be in danger, or the voyage defeated, in such case the master may impawn.'⁽¹⁾ And this doctrine is every where acknowledged,⁽²⁾ and it is a matter of familiar practice.

But courts have limited this power of the master, to cases of absolute necessity, where the voyage could be pursued by no other means; and they have in some instances denied his authority to sell the ship, or to sell the *whole* cargo at any intermediate port, under any circumstances whatever. The court said, in one case, that a sale of the ship by the master, 'is void without a special procuration by the owners';⁽³⁾ and Chief Justice Holt said, in another, 'The master has no authority to sell any part of the ship, and his sale transfers no property.'⁽⁴⁾ Mr. Justice Radcliff of New York, speaking of a clause in a bottomry bond, whereby the captain was expressed 'to grant, bargain, and sell' the ship, to a person who furnished necessary supplies, said, 'The captain, as such, could not sell the ship, nor do more than pledge her.'⁽⁵⁾

The master's authority, in respect to a sale of the cargo, rests upon similar principles. A British ship, on a voyage from India to the coast of Africa, and thence to London, was captured by an American privateer, and plundered of half her cargo, which consisted of crates, earthenware, India *blues*, and other goods. The ship, with the rest of the cargo on board, was recaptured, and carried into Bermuda. One sixteenth part was there decreed to the recaptors, as salvage. The sails of the recaptured ship had been destroyed, and the boats which were essential to an African voyage, had been taken away, and others could not be built in less than three months. The captain, not being able to procure seamen to prosecute the original voyage, sold the remains of the cargo. The cargo had not been consigned to him. Lord Ellenborough said, 'I think you had no right to make a general sale of the cargo. Nothing but extreme necessity will warrant the master in making a sale of any part of the cargo. I do not say that even extreme necessity would have warranted the master in selling the whole. He might probably have raised something by hypothecation sufficient to defray the expenses of salvage.' And this opinion was afterwards confirmed by the other judges.⁽⁶⁾

But it is obvious, that in some circumstances, to deny the captain the power of selling the ship or cargo, or the remnants of either, would be subjecting the owners to the certain and abso-

The master may hypothecate the ship or cargo in case of necessity.

(1) *Bridgman's Case*, Hob. 11.

(2) *Laws of Oler. a. 22.*

Whether the master may sell the ship and cargo.

(3) *Tremenhere v. Trisilian*, 3 Keb. 91. S. C. 1. Sid. 453.

(4) *Johnson v. Shippen*, 2 Ld. Raymond, 982; S. C. 1 Salk. 35.

(5) *Robertson v. Unit. Ins. Co.* 2 Johns. Cas. 252. See also *Warder v. Goods saved, &c.* 1 Peters's Adm. Dec. 37.

(6) *Wilson v. Millar*, 1 Starkie, 1.

lute loss of them. An authority in the captain for this purpose, has accordingly been recognised in divers cases, and may be considered as established upon sufficient authority.

In regard to the authority of the captain in respect to the cargo, Sir William Scott says, 'Though in the ordinary state of things he is a stranger to the cargo beyond the purposes of safe custody and conveyance, yet in cases of instant, and unforeseen, and unprovided necessity, the character of agent and supercargo is forced upon him by the general policy of the law; unless the law can be supposed to mean that valuable property in his hands is to be left without protection and care. Suppose the case of a ship driven into port with a perishable cargo—or suppose the vessel unable to proceed, or to stand in need of repairs. What must be done? The master must in such case exercise his judgment whether it would be better to tranship the cargo, if he has the means, or to sell it. It is admitted, in argument, that he is not absolutely bound to tranship; he may not have the means of transhipment; but even if he has, he may act for the best in deciding to sell. If he acts unwisely, still the foreign purchaser will be safe under his acts. If he had not the means of transshipping the cargo, he is under an obligation to sell, unless it can be said that he is under an obligation to let it perish.'⁽¹⁾

(1) *The Gratitude*, 3 Rob. 240. See also *The Betty Cathcart*, 1 Rob. 220.

Lord Ellenborough, speaking of the title acquired by the purchaser of a ship, under a sale made by the captain, said, 'Where a ship has received irremediable injury I am disposed to go as far as I can to support what has been contended for, that the captain acting *bonâ fide* might sell the ship for the benefit of the owners. This is the disposition of my mind, but I cannot lay it down as positive law. At all events it can only be justified by extreme necessity.'⁽²⁾

(2) *Hayman v. Moulton*, 5 Esp. 65.

Concerning the authority of the captain to sell the ship under any circumstances, Chief Justice Dallas, giving the opinion of the court, said, 'The right to sell, as between the captain and the owners, has been deemed of a very questionable nature; although upon the whole, extracting from the books what seems to be the weight of authority, I conceive that the right to sell must be considered to exist in cases of extreme necessity; a right, however, which in all cases must be strictly watched.' And in respect to a sale by the master, acting with the concurrence of a part-owner, who was also agent of the other owners, the Chief Justice said, 'On the broad ground of a power to act on a sudden emergency, in order to save as much as could be saved from impending ruin, whether it be the owner or the captain, will make no difference, if the circumstances justified the selling, and the sale was honestly and fairly conducted.'⁽³⁾

(3) *Idle v. Roy. Ex. Ass. Co.* 3 Moore, 145, 148.

Upon the same subject, Chief Justice Gibbs says, 'I think the assured ought to have acted as if the adventure had not been insured; and if a man of common prudence would have repaired the ship for his own advantage, not being insured, he should have done so on account of the underwriters; otherwise he would be selling the ship for the purpose of throwing the loss upon the underwriters.'⁽⁴⁾

(4) *Green v. Roy. Ex. Ass. Co.* 1 Marsh. Rep. 447; 8 C. 6 Taunt. 68.

A cargo being insured on a voyage from London to Demerary, the ship was captured, and plundered of her stores, and the whole crew taken out except the captain and a boy. She was afterwards recaptured and carried into St. Thomas's, where the captain, according to his statement in court, could not procure a crew to proceed to Demerary, nor pay the salvage without selling the cargo. He accordingly sold the ship and cargo soon after arriving there, and broke up the voyage. Lord Ellenborough said, 'Although the captain could not at first procure a competent crew, he ought to have waited a reasonable time for that purpose. Having arrived on the 12th, he on the 15th gets a decree from the vice-admiralty to sell the ship and cargo. I conceive he had no right to sell the cargo. To enable him to pay the captors' eighth, he was bound to have tried, seriously and deliberately, every other expedient to raise the money. It does not satisfactorily appear that he might not have raised the money by drawing on his owners, or by hypothecating the ship.'(1)

(1) *Underwood v. Robertson*, 4 Camp. 138.

In case of insurance on a ship and the freight, from Calcutta to London, the ship was compelled by sea-damage to put back to Calcutta, where the captain sold the ship, not being able to procure funds by hypothecation, sufficient to defray the expense of repairs; and he was of opinion, also, that the ship was so much damaged that she was not worth repairing. The jury found it to be a total loss. Chief Justice Dallas said, 'The jury have found that what was done, was done in the exercise of an honest discretion, and for the benefit of all concerned; and I see no reason to overturn the conclusion to which they have come.' Park, J. 'A case of stronger necessity to justify the sale of a ship, has seldom been made out.' Burrough, J. 'Who can doubt that the jury were correct, and the captain was warranted in all he did.' Richardson, J. dissented as to the case then under consideration, but as to the captain's authority to sell, he seems to agree with the other judges. He said, 'It is certain the assured has no right to sell, except in case of strong necessity; perhaps he is not confined to a case of physical necessity, but the necessity must be such as would induce a prudent man, if uninsured, to sell.'(2)

(2) *Read v. Bonham*, 3 B. & B. 147.

The same doctrine prevails in the United States. Mr. Justice Wilde, giving the opinion of the court in Massachusetts, said, 'Unless it appears that a sale was necessary, the master has no authority to sell the cargo, or any part of it, at an intermediate port.'(3)

(3) *Dodge v. Union Ins. Co.* 17 Mass. Rep. 478.

A vessel on a voyage from Russia, with a cargo of hemp, put into Holland on account of sea-damage, where she was found to be unfit to proceed on the voyage. Another vessel might, however, have been procured there, but in consequence of sea-damage the hemp was not in a fit state for re-shipment, and for this reason the captain gave over the voyage, and sold the cargo. This was held in New York, to be a total loss on the cargo.(4)

(4) *Whitney v. N. York Firem. Ins. Co.* 18 Johns. 208.

In the same state, the captain was considered as being invested with authority to sell a vessel which was stranded in such a

(1) *Fontaine v. Phœn. Ins. Co.* 11 Johns. 295.
 (2) *Idle v. Roy. Ex. Ass. Co.* 3 Moore, 115.

The decree of an admiralty court does not, of itself, give the master authority to sell the property.

(3) *lb.*
 (4) *Reid v. Darby*, 10 East, 143.
 See also *Andrews v. Glover*, *Abbott on Mer. Ships*, p. 8.
 (5) *Idle v. Roy. Ex. Ass. Co. Ut Supr.* *Hayman v. Moulton*, 5 Esp. 65; *Hunter v. Prinsep*, 10 East, 378.

Whether in case of the vessel being disabled the assured on goods must procure another.

(6) *Ludlow v. Col. Ins. Co.* 1 Johns. 335; *Low v. Davy*, 5 Bin. 545. 2 Serg. & Rawle, 558.

(7) *Dorr v. N. Eng. Mar. Ins. Co.* 4 Mass. Rep. 232.

situation, that an attempt to get her off and repair her, would be attended with very great expense, and probably cost more than the value of the ship when repaired. The fact that the purchaser succeeded in getting off the ship, and repaired her, was considered not to affect the assured's right to abandon.⁽¹⁾ And in this circumstance the decision coincides with one given in England.⁽²⁾

It has been held that the decree of a vice-admiralty court, ordering a sale, is not conclusive evidence of the necessity of the sale.⁽³⁾ Lord Ellenborough says, 'No instance has been discovered in which such a power has been exercised by the admiralty court at home; nor can we find any terms in the vice-admiralty commission, or any principle, upon which that practice can be sustained.'⁽⁴⁾ Unless the sale of the ship be expedient, and in a manner necessary, under the particular circumstances, the sale by the captain gives no title to the purchaser, who must look to his title, since he is acquainted with the facts, and may judge whether they authorize the captain to sell.⁽⁵⁾

But where a sale is made *bonâ fide* by the captain, and is properly conducted, there is great reason for leaning in favour of the title of a fair purchaser, since otherwise captains will be obliged to sell property, in cases of necessity, at a great sacrifice, to purchasers who consider themselves as taking a doubtful title.

Section 4. Of the Cargo.

A total loss of the vessel may occasion a total loss of the cargo, but this is not a necessary consequence. Where the vessel is prevented from proceeding to the port of destination, but the goods are carried thither by any other vessel, the assured cannot abandon.⁽⁶⁾

If the ship is wrecked or disabled, and the cargo saved, it becomes a question, whether the assured must procure another ship to carry on the cargo to the port of destination, if one can be procured for this purpose.

In a case of insurance from New York to Bremen, the vessel being captured and carried into England, both vessel and cargo were acquitted, but the cargo had been landed, and the full freight for the whole voyage had been paid by the person to whom it was delivered, who could not, under the circumstances, do otherwise than pay the entire freight; and the master was considered by the court to be discharged from his obligation to perform the voyage, which seems to make the case the same, in respect to a total loss, as if the vessel had been disabled. Chief Justice Parsons said, 'We can find no case, where, under these circumstances, the owner receiving his cargo in a foreign port, is obliged to hire another ship to transport his goods to the port of destination.' And the opinion of the court was accordingly in favour of the right of abandonment.⁽⁷⁾

Lord Mansfield, speaking on the subject of partial or total loss of the cargo by damage to the ship, said, 'The ship has

received an irreparable hurt within the policy, this drives her back to Tortola, and *there is no ship to be had there which could take the whole cargo on board.* To show how completely the voyage was lost, and that no ship could be got, the assured have not been able to send that part of the goods which they purchased to London.'(1) This implies very distinctly that if another ship could have been procured, and the assured had neglected to procure it, he would not have been entitled to recover for a total loss. In a similar case the counsel of the assured stated as a material fact to support the claim for a total loss, that no other vessel could be seasonably obtained to carry on the cargo.(2)

(1) *Manning v. Newnham*, Park, 260.

(2) 2 M. & S. 240.

In a case upon a policy on wheat, from London to Lisbon, the vessel put into Dover in a disabled state; Lord Ellenborough said, 'If the voyage was not worth pursuing, and there was no means of pursuing it, I think it must be considered a total loss. It appeared, however, that although the ship was unable to pursue the voyage, there was a brig lying in Dover harbour at the time, in which the wheat might have been carried on to Lisbon;' for which reason, among others, he was of opinion that it was not a total loss.(3)

(3) *Wilson v. Roy. Ex. Ass. Co.* 2 Camp. 626.

It has been distinctly held, in New York, that the assured on goods cannot claim for a total loss, in case of the ship being disabled and the goods saved, if another suitable ship can be obtained, within a convenient distance, and without any very extraordinary delay or sacrifice.(4) 'It is understood,' says Chancellor Kent, 'to be the duty of the master, when his vessel is disabled in the course of the voyage, to procure another, if he can, to take on the cargo;' and his contract with the new vessel will give the owners a lien on the goods for freight.(a)

(4) *Saltus v. Ocean Ins. Co.* 12 Johns. 107.

Accordingly the vessel's being disabled in the course of the voyage does not, in all cases, constitute a loss of the voyage in respect to the cargo. The captain may in such case repair his own vessel if it can be done, or otherwise he may hire another, and if it is through his fault and negligence that neither is done, this does not give the assured any right of abandonment, since the insurers are not at the risk of the conduct of the captain in this respect.

Where only a part of the cargo is saved in case of shipwreck or other accident, and where the whole, or surviving part of the cargo is materially damaged; whether it is the duty of the captain to carry on the goods to the port of destination, depends, not only upon the facility or difficulty of procuring another ship, but also upon the quantity of goods saved, and the additional damage to which they would be liable by being re-shipped and carried on in their damaged condition.

Whether another ship must be procured to carry on a part of the goods, or damaged cargo, saved from shipwreck or other accident.

Chief Justice Dallas said, 'Where the ship has been lost, and the cargo materially damaged, is the assured bound to send on

(a) *Searle v. Scovell*, 4 Johns. Chanc. Rep. 222. See 1 Emer. 427. c. 12. s. 16; Ord. Louis XIV. tit. du fret, a. 11, 21, 22; Val. Sur. Ord. de la Mar. tit. du fret. a. 11; Poth, des Chartes-parties, n. 68.

(1) *Hudson v. Harrison*, 3 Brod. & Bing. 106.

the goods taken from the wreck? And if so, is he bound to send only when half is saved, or a third, or a quarter? Is he bound to send them on at all events, or only under certain circumstances? That the rule on this subject differs, is clear from the various text writers; some stating it at a fourth, some at a third, and some at a half; we must therefore act on the custom of the country in which the loss happens.⁽¹⁾

Insurance was made on 241 pipes, and 71 half pipes of wine, for a voyage from the Cape of Good Hope to Bristol and Dublin. One hundred pipes of the wine were intended to be delivered at Bristol, and the remainder at Dublin. In the course of the voyage the ship was driven by a gale of wind upon the rocks near Portishead, about 13 miles from Bristol, and soon afterwards fell over upon her side. The tide rises at Portishead near 40 feet, and, at high tide, nearly the whole of the cargo was under water, and a greater part of it was under water about nine hours each tide. Eleven casks of the wine being taken out of the vessel, the remainder of the cargo was discharged through a hole cut in her side for this purpose, and was carried to Bristol in lighters. Two hundred and twenty-nine pipes, and sixty-seven half pipes were saved. About one quarter of the whole number saved came out sound and full, one fifth part were impregnated with salt water, about one thirteenth part were entirely empty, and the others had partly leaked out, or were affected more or less with salt water, but were thought by some of the witnesses to be merchantable. The ship was afterwards floated, and towed to Bristol, but was not worth repairing. Chief Justice Dallas said, 'The cargo was so damaged and reduced as to render the loss total;' and Justices Park, Burrough, and Richardson were of this opinion. Mr. Justice Richardson said, 'It is material, that the part of the cargo which was damaged by salt water must have become worse by delay, and consequently by carriage on to Ireland.'⁽²⁾

(1) lb. 97.

Damage to the cargo exceeding half of the value, gives a right of abandonment.

(2) L. 2. tit. 10. s. 3. a. 180.

(3) Tom. 2. p. 201.

Where the loss, as being partial or total, depends on the *amount* of damage merely, the rule is the same, in respect to the cargo, as in a policy on the ship; if the loss exceed half the value, the assured may abandon.^(a)

The French code⁽³⁾ restricts the right to cases of damage to three quarters of the value. Valin⁽⁴⁾ supposes this rule not to apply to a case of the absolute loss of a part of the goods insured, the rest remaining sound, but only to cases of injury and deterioration in value by sea-water or otherwise, where the goods remain in quantity. And he says also, that if a part of the goods are thus damaged, the assured may abandon the damaged goods, provided the damage exceeds half of their original value, but that he cannot abandon the sound goods, though the damage exceeds half of the value of all the goods insured in the

(a) *Le Guidon*, c. 7. a. 1; *Gardiner v. Smith*, 1 Johns. Cas. 141; *Judah v. Randall*, 2 Caines' Cas. 324; *Ludlow v. Col. Ins. Co.* 1 Johns. 335; *Moses v. Col. Ins. Co.* 6 Johns. 219; *Marcadier v. Chea. Ins. Co.* 8 Cranch, 29; 1 Wheat. 228. n.

policy. But the rule is, in general, differently understood, and it is held, that if half of the value of the goods is lost, whether by the destruction of a part of the goods, or deterioration in value, of a part or the whole, the assured may abandon.

The question, in regard to the time and place of taking the value, does not arise in regard to a loss on goods, as the damage, and the value of what remains, are to be estimated at the same rate, it makes no difference whether a higher or lower rate is assumed.

In case of insurance upon 300 barrels of flour, from New York to London, 123 barrels were thrown overboard in making jettison, and 30 more were sold on account of sea-damage, at Norfolk, where the vessel put in for the purpose of refitting in the course of the voyage. The assured abandoned and claimed for a total loss. After the abandonment, the 147 barrels of flour remaining on board arrived at the port of destination. If the whole value of the 123 barrels thrown overboard, and also the whole value of the 30 sold at Norfolk, were to be considered as lost, there had been a loss of more than half of the value insured. But as the damaged flour was sold at Norfolk for more than half of its invoice value, if only the damage was considered to be included in the loss, and not the whole value of these 30 barrels, there had not been a loss of 50 per cent. Mr. Justice Van Ness, giving the opinion of the court, said, 'The contract between the parties is, that the whole of the article insured shall arrive at the port of destination. Of the 300 barrels of flour insured, not more than 147 barrels arrived at the port of destination. The 30 barrels sold at Norfolk, were as much lost to the assured, within the meaning of the contract, as though they had been cast into the sea. The argument on the part of the defendants is, that crediting the money arising on the sales of the damaged flour, the loss amounted to less than a moiety of the prime cost. This argument at first view appears plausible, but its fallacy is easily detected. The contract is not that there shall be a delivery, at London, of a part of the property insured, and so much money as will be equal to a moiety in value of the 300 barrels. The insurer undertook that the whole article insured should arrive at the port of destination, and the assured have nothing to do with the money for which the damaged goods were sold. The plaintiffs are entitled to judgment as for a total loss.'⁽¹⁾

A loss of more than 50 per cent upon goods, by compromise with captors, has been held to be a total loss, no less than sea-damage in that proportion.⁽²⁾ Where a part of the goods insured were condemned, and to prevent an appeal the master agreed to pay the captors 5,000 dollars, and to raise this sum sold more than half in value of the goods insured; it was held to be a total loss.⁽³⁾

A part of a cargo being insured, more than half in value of the goods insured, but less than half of the goods on board belonging to the assured, were sold by the captain, to raise money for the purpose of effecting a compromise with the captors, for

(1) *Moses v. Col. Ins. Co.* 6 Johns. 219.
(2) *Clarkson v. Phoen. Ins. Co.* 9 Johns. 1; *Waddell v. Col. Ins. Co.* 10 Johns. 61.
(3) *Vandenhoevel v. Unit. Ins. Co.* 1 Johns. 406.

Compromise with captors by giving more than half of the value of the goods.

A loss of half the value of the goods insured, though less than half

the value of those on board belonging to the assured, gives a right to abandon.

Damage to articles insured free from average, is not included in applying this rule.

(1) *Vandenhoevel v. Unit. Ins. Co.*
1 Johns. 406.

the release of the whole cargo. This was considered to be a total loss, and Mr. Justice Livingston said, the rule as to half applied equally, whether the policy covered the whole, or only a part of the goods on board, belonging to the assured.(1)

If the goods insured consist partly of memorandum articles, on which the insurers are not liable for any partial loss, the assured cannot abandon for the amount of sea-damage, unless the damage of the articles not exempted from partial loss, be equal to half the value of the whole of the goods insured, including the memorandum articles. Goods of the value of 29,889 dollars, of which 7,439 dollars in value, were memorandum articles, free from partial loss, were insured from New York to Nantz. The vessel put into Antigua in distress, where the captain broke up the voyage on account of the sea-damage sustained by the goods, and sold the cargo. The net proceeds of the whole cargo were 13,767 dollars, and that of the memorandum articles 6,863.

Mr. Justice Story, giving the opinion of the court on the right to abandon, said, 'The case embraced some articles within, and some without the purview of the memorandum. In such a case, no abandonment for mere deterioration in value, could be valid, unless the damage on the non-memorandum articles exceeded a moiety of the whole of the goods insured, including the memorandum articles. The case was considered, as to the underwriters, the same as though the memorandum articles should exist in a sound state. In this way the underwriter would never be made responsible for partial losses on memorandum articles, and the technical total losses, for which alone he could be liable, were such as stood unaffected by the perishable nature of the commodity.' And the court was of opinion that the assured in this case had not a right to abandon.(2)

Loss by jettison of the goods insured.

If goods are thrown overboard in jettison, the claim of the assured against the underwriters for a partial or total loss, has been considered as resting upon the same grounds as if the goods had been lost by the immediate operation of the peril, on account of which the jettison is made, and without the intervention of any act of the master and crew.(3)

Whether the assured must, in the first instance, claim contribution of the owners of the ship and other shippers.

In the case of a claim for a loss by jettison of the goods insured, Chief Justice Tilghman said, 'There should be a demand made from the persons bound to contribute, and some reasonable endeavour to procure payment. The assured has not a right, in the first instance, to make an election whereby a loss, partial in its nature, is by construction rendered total.'(4)

(4) *Lapsley v. U. S. Ins. Co.*
4 Bin. 502.

A different opinion has been entertained in New York, where it has been distinctly adjudged that the assured, whose goods have been lost by jettison, may recover the loss of his underwriters in the first instance, the risk of jettison being one of those expressly insured against: the court says, 'he has a right to look for indemnity from the person who has engaged to indemnify him.'(5)

(5) *Magrath v. Church*, 1 Caines, 215.

But in case of any loss by the neglect of the assured or his agents in demanding contribution, as where the master should

neglect to have an average apportioned at the port of discharge, and should deliver the goods to the consignees, and thus lose the lien upon them for the amount of the contribution, it can hardly be doubted that the underwriters would be exonerated from their liability as far as the loss would have been made up by the contribution from the other parties. The master is the proper agent of the assured in this respect, whether the assured is owner of the ship or not. This was a ground of the decision in *Pennsylvania* above cited, it seems, for the Chief Justice said, 'It does not appear that the assured ever applied to the persons bound to contribute, or that there was the least difficulty in procuring payment from them.'

A quantity of iron, copper, and nails, being insured, 'free from average,' on a voyage from London to Quebec, the vessel sailed on the 15th of September, but having encountered severe gales, in her passage to Newfoundland, was found to make so much water as to be obliged to put back to Kinsale in Ireland, where she arrived on the 25th of October. The copper had not been damaged, but some of the boxes of nails were damaged 75 per cent, and others only 10 per cent. It was necessary to discharge the cargo for the purpose of making a thorough repair of the vessel. The repairs could not be completed soon enough to enable the vessel to reach Quebec that season, and no other vessel could be procured at Kinsale or Cork, to carry on the cargo, and if one could have been procured, it was too late to prosecute the voyage that season. The voyage was accordingly abandoned, and the captain sailed on another voyage; and the goods insured were sold.

The interruption of the voyage until the following season, is not a total loss of the cargo.

Lord Ellenborough said, 'The ship was under a temporary disability; though the means of repairing her were no doubt easily attained at so commodious a harbour as Kinsale, and it does not appear that the necessary repairs could not have been made before March. However, she could not be repaired in time for the voyage that season. This then is a case of the loss of the voyage for that season. The only description of loss is a temporary suspension of the voyage. I am aware that an insurance upon a cargo for a particular voyage, contemplates that the voyage shall be performed with the cargo, and any risk, which renders the cargo permanently lost to the assured, may be a cause of abandonment. A total loss of the cargo may be effected by a total and permanent incapacity of the ship to perform the voyage. That is a destruction of the contemplated adventure. But an interruption of the voyage does not warrant the assured in totally disengaging himself from the adventure, and throwing this burthen upon the underwriters.'⁽¹⁾ This insurance was free from average, but the opinion of the court, in respect to breaking up the voyage, does not appear to turn at all upon the exception of average losses.

(1) *Anderson v. Wallis*, 2 M. & S. 240.

Goods being insured from New York to Amsterdam, with liberty, in case of being turned off on account of blockade, 'to proceed to a neighbouring port;' the master learning that Amsterdam was blockaded, put into the port of London. This the

Blockade of the port of destination does not give a right to

abandon the cargo, if the ship has liberty to proceed to another port.

(1) *Ferguson v. Phœn. Ins. Co.* 5 Binn. 544.

Total loss of the cargo by plunder, and damage to the ship.

* 2 Burr. 1269. 1 T. R. 615.

(2) *Gilfert v. Hallett*, 2 Johns. Cas. 296.

Sugars so damaged as not to be in a fit state to reahip.

(3) *Gernon v. Roy. Ex. Ass. Co.* 1 Holt, 49.
(4) *S. C.* 2 Marsh. Rep. 92; 6 Taunt. 383.

A cargo of wheat may be abandoned while it is under water.

court held to be a *neighbouring port*, and allowing that the blockade would have broken up a voyage to Amsterdam only, they held that it did not break up the voyage described in this policy, so as to give a right to abandon the goods.⁽¹⁾

After a part of the goods insured, though less than half in value, arrives safe, the assured cannot abandon.^(a)

A cargo being insured from New York to Barraçoa, the vessel was compelled, in the course of the voyage, to put into New Providence, on account of sea-damage, the loss of one man, and the fatigue of the others, and the want of supplies, occasioned by the extraordinary delay of the voyage, where the cargo was sold for the reasons stated by Mr. Justice Kent, in giving the opinion of the court on the question of a right to abandon; who said, 'Was the voyage broken up so as to justify an abandonment on the arrival of the vessel at New Providence? The whole cargo amounted, originally, to 16,000 dollars. Only a small parcel, probably not a third was sold, and a great quantity of goods, and 4,780 dollars in cash, were lost by the acts of pirates, so that the amount of the whole cargo remaining, did not exceed 3,701 dollars. Considering that the vessel was injured, and the necessaries exhausted, and the cargo so greatly diminished by the piracy, I think the voyage may be deemed to have been broken up, and not worth pursuing. The expense of pursuing it would have exceeded the benefit arising from it.* The remains of the cargo could not justify the re-equipment of the vessel and the continuance of the voyage.'⁽²⁾

In case of insurance upon sugars, from Liverpool to Calais, the vessel sailed on the 2d day of December, but having encountered severe weather, and struck upon a bank, was compelled to return to Liverpool on the 20th. Surveyors reported that the sugars were all more or less damaged, and that it would be advisable to sell them. They were accordingly sold, and the assured abandoned. Chief Justice Gibbs said, 'The assured are not justified in abandoning, unless the property be in such a state that it cannot be applied to the original purpose of the voyage. Was it in such a state as to be sent to its original destination? It is in evidence, that no part of it was in a merchantable state. If it was not in a proper condition for the market, I am of opinion that the assured were entitled to abandon.'⁽³⁾ And the other judges subsequently concurred in the opinion that it was a total loss.⁽⁴⁾

In case of insurance upon wheat, the vessel ran upon a rock, and filled in consequence, and to prevent her sinking, was run aground, where the tide flowed over her at high water. The wheat, was taken out in such quantities as could be unloaded from time to time, until, in the course of three or four weeks, about two thirds of it were discharged and kiln-dried. It was held that the assured could not abandon after this part of the cargo

(a) *Seton v. Del. Ins. Co.* Wharton's Dig. 334. h. t. No. 165; *S. C. Condy's Marsh.* 562. n. See also Mr. Binney's remarks upon this subject, 4 Binn. 506. and see 2 Burr. 683.

cargo was saved;(1) but Lord Ellenborough said, 'The assured might have abandoned while the corn remained under water.'(2) But this observation ought to be taken in reference to the particular case, since many articles might be under water, at high water, on board of a vessel in some situations, where there might be the greatest probability, and indeed a certainty, of recovering them without very great damage or expense in comparison with their value.

The fact, whether the thing remains *in specie* or not, has been sometimes considered a criterion by which the loss is distinguished to be partial or total; it being assumed as a rule, that if the thing is so changed, by the peril insured against, as to be no longer the same that was insured, the loss is total. Thus the body of a coach that was insured, being thrown overboard to lighten the ship, it was held to be a total loss, because the wheels, and what else remained, did not constitute a coach.(3) The same principle has been recognized in other cases.(4) This is, however, a subtle and intricate inquiry, which in very many instances leads to no satisfactory result.

In the early cases on capture, in determining whether the loss was total, it was considered whether the captors had carried the vessel within the jurisdiction of their own government—*infra præsidia*—and whether the property was changed; the principle being assumed, it seems, that the loss was not total until the assured was divested of his property in the subject.(a)

But it is now universally held that a capture gives the right of abandoning immediately; and this right subsists as long as the property remains in the hands of the captors, whether in port or at sea. The character of total loss, and the right of abandonment, continue after the condemnation of the property, and an appeal by the assured to a superior court;(b) and after acquittal and an appeal by the captors which prevents the decree of restitution from being executed.(5) And Chief Justice Tilghman says, 'While the case remains open to an appeal, and the property is held by the captors, the peril cannot be said to be over.'(c)

A cargo of teas being insured from New York to Bremen, was captured and carried into England, and restoration decreed there on the 16th of June, 1806, and the teas sent on to Bremen by a different vessel, on the 28th of July; the assured having abandoned in Boston on the 18th of July. Chief Justice Parsons, giving the opinion of the court, said, 'The voyage was lost, and must be considered as continuing lost, until an opportunity offered of shipping the teas on board another ship to Bremen. The case states no opportunity of shipping them to Bre-

(1) *Anderson v. Roy. Ex. Ass. Co.* 7 East, 38.

(2) *Davy v. Milford*, 15 East, 565.

If in consequence of the perils insured against the subject no longer remains *in specie*, it has been considered a total loss.

(3) *Judah v. Randall*, 2 Caines' Cas. 324.

(4) 15 East, 559; 3 B. & P. 474; 15 Mass. Rep. 343.

(5) *Bordes v. Hallet*, 1 Caines, 444.

Goods captured are acquitted, and ten days before they are re-shipped for the port of destination, are abandoned.

(a) *Assievedo v. Cambridge*, 10 Mod. 77; ——— *v. Sands*, 10 Mod. 79; *Goss v. Withers*, 2 Bur. 683; *Dean v. Dicker*, 2 Str. 1250; *Hamilton v. Mendes*, 2 Bur. 1198. (b) *Dorr v. Un. Ins. Co.* 8 Mass. Rep. 494; *Rhineland v. Ins. Co. of Penn.* 4 Cranch, 29. (c) 3 Bin. 293. where he cites for this, *Dutliff v. Gatliff*, 4 Dall. 446; 4 Cranch, 31. n.

(1) *Dorr v.*
N. E. M. Ins.
Co. 4 Mass.
Rep. 221.

men in another ship, until the 28th of July. This was ten days after the offer to abandon. The loss therefore continued total when the offer to abandon was made: for the safety of the cargo will not change the total loss of the voyage existing, until there be an opportunity, in a reasonable time, to reship the cargo, and the owner is not obliged to wait for other ships. (1)

But it seems to be material in such a case to consider whether it was probable or certain, at the time of abandonment, that the master or other person having charge of the teas by the special authority and appointment of the assured, could procure another vessel at a reasonable freight and within a reasonable time. After the actual restoration of the property, it seemed to be no longer a detention by capture; and the question then occurred, whether the voyage had been broken up by the capture.

Abandonment
 made after
 the final de-
 cree of resti-
 tution, but be-
 fore restitu-
 tion is actu-
 ally made.

A loss in consequence of capture merely, and independently of damage and other obstructions to the voyage, ceases to be total from the time of rendering the decree of acquittal, and the removal of the obstacles to the assured's regaining possession of the property and prosecuting the voyage. It is not necessary that the assured should be in actual possession of the property, in order to prevent the loss from continuing any longer to be total.

(2) *Adams v.*
Del. Ins. Co.
3 Binn. 287.

Insurance being made on goods from Philadelphia to St. Jago de Cuba and back, the property was captured by the French, but acquitted in the court of admiralty, in St. Domingo, on the 6th of June 1806, from which decree the captors appealed, and the decree was affirmed by the court having final jurisdiction on the 10th of the same month. The master could not return to the vessel with the order of restitution until the 21st of June. On the 22d, the officer in possession of the vessel and cargo, as soon as the order of acquittal and restitution were shown to him, delivered them into the possession of the master. The assured having intelligence of the capture, had abandoned on the 21st of June, being the same day on which the master arrived, with the order of acquittal and restitution, where the vessel lay, and before the order was executed. This was held not to be a total loss at the time of the abandonment, nor at any time after the final decree of restitution was made. (2)

A similar decision had been previously made by the supreme court of the United States, in the case of a policy on the brig Rolla, which had been captured, and a final decree of restitution awarded on the 9th of July, 1806, and restitution was actually made on the 19th of that month. The assured had made an abandonment on the 17th of the same month. Chief Justice Marshall, in giving the opinion of the court, said, 'A detention by capture or embargo may be of such long continuance as to defeat the voyage. Those detentions, therefore, are for the time total losses, and they furnish reasonable ground for the apprehension that their continuance may be of such duration as to break up the voyage, or ruin the assured by keeping his property out of his possession. Such a case, therefore, upon the true principles of the contract, has been considered as justify-

ing an abandonment, and a recovery for a total loss. But when a final decree has been awarded, the peril is over. On no reasonable calculation can it be supposed that such a delay of restitution will ensue, as from that time to break up the voyage.'⁽¹⁾

'It has been decided,' says Chief Justice Marshall, 'that a capture by one belligerent from another, constitutes a total loss. And where there is a complete taking at sea by a belligerent, who has taken full possession of the vessel as prize, and continues that possession to the time of abandonment, there exists, in point of law, a total loss.'⁽²⁾

In regard to arrest and detention, as distinguished from capture, Lord Mansfield says, 'by the general law, the assured may abandon in case merely of an arrest on an embargo by a prince not an enemy';⁽³⁾ and Chief Justice Marshall, 'it is universally admitted, that an embargo constitutes a detention, which amounts, at the time, to a total loss, and warrants an abandonment.'⁽⁴⁾ There is no distinction between an embargo and any other arrest insured against in the policy.⁽⁵⁾ 'It has been well settled,' says Chief Justice Parker, 'that any detention by princes, by embargo, or otherwise, gives the assured the right to abandon and claim for a total loss, as well as a capture by enemies.'⁽⁶⁾

The arrest here intended must be understood to be such a one as may probably be of a long continuance, or, at least, of which the duration is uncertain. It has never been decided that an arrest, which appeared by the circumstances and object, to be only of a very short duration, gives the right of abandonment. It was held in Genoa, that a detention of the ship for the purpose merely of discharging the cargo, which was taken by the government for public use, did not give a right to abandon the ship.⁽⁷⁾

If, in case of the capture and condemnation of the property, and its being sold in pursuance of the sentence, the captain buys it on account of the owners, and they affirm the purchase, the loss is the amount paid by the captain to regain possession of the property, and the transaction is equivalent to a compromise with captors, where there is no adjudication.^(a) From the time of the purchase and removal of the restraint, the loss ceases to be total on account of the arrest merely, but it may still be total on account of the damage or amount of expense. And under such circumstances the captain acts for the owners, and they have a right to the advantage of the purchase.^(b) And if a vessel is sold on account of sea-damage, after a survey, at the instance of the master, and bought by him, and he refits her, and again puts to sea, the sale is a useless ceremony, and the loss will be adjusted as if no sale had been made.⁽⁸⁾

(a) *M'Masters v. Shoolbred*, 1 Esp. 237; *Queen v. Un. Ins. Co. Condry's Marsh.* 582. n.; *Abbott v. Sebor*, 3 Johns. Cas. 39; *Story v. Strettell*, 1 Dall. 10; *Oliver v. Newbp. Mar. Ins. Co.* 3 Mass. Rep. 37; *Unit. Ins. Co. v. Robinson*, 2 Caines, 280. (b) *Wilman v. Gray*, S. J. C. Mass. 1789; *Dane's Dig. tit. Assumpsit, a. Abandonment.*

(1) *Marshall v. Del. Ins. Co.* 4 Cranch, 202.

(2) *Rhine-lander v. Ins. Co. of Penn.* 4 Cranch, 29.

Arrest by embargo is a total loss.

(3) 2 Burr. 696.

(4) 4 Cranch, 43. See *Odlin v. Ins. Co. of Penn.* Hall's L. J. v. 2. p. 222.

(5) 4 Cranch, 44.

If an arrest is known to be only for a short time, it is not a total loss.

Case of the captain's buying the property, sold in consequence of some of the perils insured against.

(6) *Lee v. Boardman*, 3 Mass. Rep. 245. See also

M'Bride v. Mar. Ins. Co. 5 Johns. 299.

(7) *Roc. h. t.* n. 60; 1 Emer. 536. c. 12. s. 30.

(8) *Ralston v. Un. Ins. Co.* 4 Binn. 386.

Whether the assured are bound by the captain's purchase of the property insured.

(1) *Storer v. Gray*, 2 Mass. Rep. 565.

(2) *Oliver v. Newbp. Mar. Ins. Co.* 3 Mass. R. 51.

(3) *Sawyer v. Maine F. & Mar. Ins. Co.* 12 Mass. Rep. 291.

(4) 7 Johns. 423.

It has however been held in some cases, that if the captain buy a vessel, sold to pay the expense of salvage by recapture, the assured may elect whether to adopt the purchase.⁽¹⁾ In such a case the opinion of the court in Massachusetts, as given by Mr. Justice Sewall, was, that 'If the purchase of the captain may be considered, in the event, a recovery of the ship to the assured, it became so by their assent to it after his return. The general authority of the master does not extend to the power of binding his owners in a purchase of that kind. Nor will the mere safety of the ship, if the assured refuse to accept it, when the voyage has been entirely defeated, deprive the assured, for a particular voyage, of the right of abandonment.'⁽²⁾

A vessel insured from Portland to Port au Prince, was captured in sight of that place, under pretence of a violation of blockade, and carried to St. Marks, in the island of St. Domingo, and there condemned and sold; but was bought by the master for 4,000 dollars, having been valued in the policy at 7,000 dollars. The master proceeded to Philadelphia with the vessel, and there sold her on his own account. Chief Justice Parker, giving the opinion of the court, said, 'Where the owner has purchased his vessel, and will not abandon her, he shall not recover for a total loss. But it has not been decided that the right to abandon shall be devested by an unauthorized purchase by the master, avowedly made on his own account, and not on account of the owners. Unless they had given previous authority, or had subsequently ratified his act by accepting the vessel, they could not be obliged to relinquish their claim upon the underwriters.'⁽³⁾

The same doctrine is laid down in other cases. And if the insurer has become substituted for the assured, he has the same election. Where the ship had been abandoned before a compromise was made with the captors, Chief Justice Kent said, 'The purchase of the vessel by the captain, was for the benefit of the insurer if he chose to take it.'⁽⁴⁾

The doctrine, that the owner of the property may assume the purchase if it turns out favourably, or throw it upon the captain if it proves to be a losing bargain, certainly makes it a very hard case for the captain, who must purchase, that another may reap the profit, if any, while he alone must take the risk of a loss. The more equitable construction seems to be, that if he acts *bonâ fide*, and within the authority which the particular circumstances may reasonably be supposed to confer upon him as the depositary of property respecting which extraordinary measures must be taken, unless it is to be left to total loss and destruction, his acts ought to be binding upon those of whom the extraordinary circumstances constitute him the involuntary agent. If the ship is lost, or the goods are lost, or come to a bad market after a purchase prudently made by the captain, may the assured, by electing not to assume the purchase, throw the loss upon the captain? If he cannot do this, it shows that the purchase is made by the assured, and that the act of the captain in purchasing the property, like any act of an agent done honestly

and within his authority, is binding upon his principal. How does this case differ in principle from that of the captain's raising money in case of necessity? 'In all cases,' says Chief Justice Dallas, 'the power of the captain to bind the owners arises out of his situation and from necessity; he is invested with an authority to raise money for the use of the ship; that authority is however subject to this qualification, that the raising the money must be shown to have been rendered necessary by the actual exigencies of the ship. The creditor who advances the money must prove the existence of the necessity which was the occasion of the loan.'⁽¹⁾ The doctrine seems well settled, that the contract of the captain in raising money in case of necessity, binds the owners, and a compromise, or purchase of the property, where the circumstances authorize it, seems to rest upon the same principles.

But whatever principle is assumed in this respect, it cannot affect the insurers. The assured, undoubtedly, has a right to avail himself of the purchase made by the captain, and if he does not, it is his own fault, for which the insurers ought not to suffer. If, by not adopting the purchase, he makes that a total loss, which would otherwise have been a partial loss, it cannot be said, that the total loss is a direct and necessary consequence of the peril insured against.

A ship and freight were insured from Liverpool to the port of discharge in the Baltic. The ship arrived at Pillau, on the 24th of September, 1810; where she was immediately seized, with her cargo, and detained by the government until the 1st of April, 1811, when she was sold at a public sale by auction, held by the maritime court at Pillau, and was purchased by the captain, who considered himself as acting for the owner. He repaired the ship and navigated her safely to London, where she arrived in August, 1811. The owner had notice of her arrival, and the master was ready to deliver her up to him, in a perfectly sea-worthy state, on his paying the amount of a bottomry bond, given by the captain for the money with which he re-purchased the ship. But the owner refused to pay the bond, to satisfy which, the vessel was sold under a decree of the court of admiralty. This was admitted to be a case of total loss of freight, but in respect to the ship, Chief Justice Gibbs laid stress upon the circumstance, that she had not been regularly condemned, and he therefore thought the property had not been changed. 'Suppose the assured chose to take the property, could the master stand out against them, as having bought her under a good title? There appears to be only an unlicensed seizure of this vessel. The captain purchases her, and has brought her home. The former owners have a right to say that the ship still continues their property.'⁽²⁾

This case relates to the ship, but the principle of the decision applies to any subject of insurance. If by the re-purchase the property is put within reach of the assured, and he can regain possession of it by paying the amount for which it was re-purchased, it is his own fault if he neglects to do this, and the loss

(1) *Boyle v. Atty*, 1 Gow, 50. See also *Cary v. White*, 1 Bro. P. C. 284; *Milward v. Hallett*, 2 Caines, 77; *James v. Bixby*, 11 Mass. Rep. 34.

Whether the assured is, or is not, bound by the captain's re-purchase of the property, is immaterial as to insurance

(2) *Wilson v. Foster*, 6 Taunt. 25; 8 C. 1 Marsh. Rep. 425.

is limited to that amount. In relation to insurance, therefore, it is immaterial whether the assured is bound by the re-purchase, or not.

Section 5. Of Freight.

Whether a total loss of the ship constitutes a total loss of the freight.

(1) *Idle v. Roy. Ex. Ass. Co.* 3 Moore, 115; *Parmenter v. Todd-hunter*, 1 Camp. 541.
(2) *Herbert v. Hallett*, 3 Johns. Cas. 93.

One of the grounds of abandoning freight, is the actual or constructive total loss of the ship.⁽¹⁾ A policy being made on freight, from New York to Havana, the vessel was driven ashore at Sandy Hook, and was so much damaged, that it required about a fortnight to repair her and fit her for sea. The voyage was relinquished, and the assured demanded a total loss. Mr. Justice Kent said,—and Chief Justice Lewis and Mr. Justice Livingston concurred in his opinion,—‘It appears to me, that the same peril, and to the same extent, ought to exist, to authorize a recovery on a policy on freight, as on a policy on the ship. If the assured could not recover a total loss on the ship, I see no reason why there should be a recovery on the freight.’⁽²⁾

In case of insurance upon freight from London to Jamaica, with liberty to touch at Madeira, the ship had been chartered for that voyage, with an agreement that the freight for the whole voyage should ‘be paid in Madeira, on the delivery of the goods shipped in London for that place, in wine at 40*l.* per pipe, which wine should be carried in the ship to Jamaica, free of freight.’ The ship arrived at Madeira, and had delivered the whole of her cargo, except 33 casks of coals retained on board by the captain to stiffen the ship until the rest of the cargo for Jamaica could be shipped, a part of it having been already shipped, when a gale of wind obliged the captain to cut his cables and run out to sea, and the ship was captured by a French privateer. The freight had not been paid. A claim was made for a total loss of freight, it being admitted at the same time by the assured, that if he was entitled to demand the freight against the freighter, the insurers were not liable. The insurers insisted that the freighter was liable to pay the freight. They said, that at least a part of the freight—from London to Madeira—had been earned, and it accordingly could not be a total loss.

Mansfield, C. J. ‘In order to understand the subject of insurance, we are obliged to refer to the charterparty. This is not only an insurance that the owner shall be in a condition to demand his freight, that is, that the ship shall be in a state to receive payment in wine at Madeira, but also that the wine shall, notwithstanding the perils insured against, be safely carried to Jamaica; otherwise if the freight were paid in wine at Madeira, and the ship afterwards lost, the owner would lose his freight by the perils insured against, and yet not be protected by the policy. It seems to be admitted, therefore, that the insurance must extend to protect the wine on board, as well as the right to receive it. Without any fault imputable to any one, an accident happened which rendered it impossible for the captain to receive the freight at Madeira. Then why may not the assured recover it from the underwriters?’

‘But it is said, that the loss can only be partial. The terms of the charterparty afford a complete answer to that objection; it is impossible that the owner, in this case, should be entitled to receive any thing for having performed a part only of the voyage.’

Chambre, J. ‘How are we to ascertain what sum the assured ought to receive for the freight from London to Madeira? It seems to me this case differs from those in which a division has been permitted.’(1)

(1) *Atty v. Lindo*, 1 N. R. 238.

But a constructive or absolute total loss of the ship, does not necessarily occasion the absolute and entire loss of the whole freight; it may have this effect, but in some circumstances it constitutes only a constructive total loss of freight, and in others only a partial loss.

In case of shipwreck, where the cargo is saved, and received at an intermediate port by the consignee, a *pro rata* freight at least is due. In such case a part of the specific freight insured is earned, and the contract so far satisfied. This ought, therefore, to be considered a partial loss, and the assured ought not to have the right to abandon, any more than he should be entitled to abandon a part only of goods insured, after their arrival and delivery at the port of destination.

The cargo received at an intermediate port by the consignee.

If the master is ready to carry on the goods to the port of destination, within a reasonable time, in another vessel, but the consignee chooses to receive them at an intermediate port, the whole freight is due, and accordingly there is neither a partial nor total loss.

But if, in case of shipwreck, or the arrest and detention of the vessel, and not the cargo, at some intermediate port, the master hires another vessel to carry on the cargo, though some rights and advantages have accrued by the transportation of the cargo on board of the original ship for a part of the voyage,—since the master would not charter another vessel, unless the freight were less than that agreed for originally for the entire voyage,—yet it is doubtful whether any benefit will finally be derived from the performance of a part of the voyage, by the original vessel, as it will depend upon the goods being delivered at the port of destination. The rights and advantages accruing from a performance of a part of the voyage, before the accident happened, may ultimately be worth the amount by which the freight for the whole voyage insured, exceeds that from the place of shipwreck or detention, to that of the destination. But as the value of this right of completing the earning of freight is contingent, and it cannot be said that any part of the freight insured has been earned, since the claim for no part of it becomes absolute, until the delivery of the goods at the port of destination; the whole subject is considered to be lost for the time, and the assured may abandon, and recover for a total loss.

Case of the cargo being carried on in another ship.

In case of a policy, upon freight, free from average, on a voyage from Tortola to London, the ship being rendered unfit to pursue the voyage, Lord Mansfield said, ‘If the voyage could have been continued in another ship, there might have been

(1) *Manning v. Newnham, Marsh. Ins.* 586.

freight *pro rata*. But it was admitted there was a total loss on the freight, because the ship could not perform the voyage.⁽¹⁾ This implies, that if the captain neglects to procure another ship, where one might be procured, his neglecting to do so will be at the risk of the assured; and that the underwriters will not, for this cause, be liable in a greater amount.

If the ship is disabled and no other can be procured, it is a total loss of freight.

In pursuance of the doctrine intimated in these cases, it has been held, that if the ship is disabled, and the master cannot procure another within a reasonable distance, it is a total loss of freight. Under a policy upon this interest, from Riga to New York, the vessel put into Kinsale, where she was found to be unfit to proceed on the voyage, and no other was to be had there, suitable for transporting the cargo. It was insisted, in behalf of the underwriters, that the captain ought to have procured a vessel from some other port. Mr. Justice Yates, giving the opinion of the court, said, 'A due regard to the protection of masters, as well as the interest of the assured, renders some limitation [of this duty of the master to procure another vessel] indispensable; and that must be by confining the search to the same port, or a port contiguous and at hand.' It seemed also that there was an objection to a reshipment of the cargo, in this case, on account of the great expense of reshipping a part of it consisting of hemp. The case was accordingly considered to be one of total loss.⁽²⁾ And in this case, as in all others of this description, much stress was put upon the circumstance, that the captain acted with good faith, and by the advice of respectable merchants.

(2) *Salut v. Ocean Ins. Co.* 12 Johns. 107.

Freight lost by the neglect of the captain to procure another ship, the original ship being stranded.

If the ship is wrecked, and by the neglect of the captain to procure another, to carry on the cargo, the freight is lost; this is not a total loss on the freight within the policy. Freight being insured from New York to Bremen, the vessel put into the Texel, where the master was obliged to run his ship ashore, to avoid running foul of other ships that were adrift, by which she was so much damaged, as to make it expedient, in the opinion of surveyors, to sell her. The cargo was seized by the order of the government, while it was in lighters, after the ship had been stranded. The assured claimed a total loss. Chief Justice Kent, giving the opinion of the court, said, 'To have entitled the assured to freight, there must have been a delivery of the cargo at Bremen, or a voluntary acceptance of it at the Texel by the consignees, or a refusal by them, upon an offer made, to have the goods sent on in another vessel. Neither of these events happened. The freight was, therefore, lost to the assured. The next inquiry is, by what means it was lost, and whether the goods might not have been sent on to Bremen by another vessel. If this might have been done, and the omission to do it arose from the voluntary act of the captain, it appears to be reasonable and consistent with the principles of the contract that the insurers should be discharged; and they were considered not to be liable.'⁽³⁾

(3) *Bradhurst v. Col. Ins. Co.* 9 Johns. 17.

Had the master procured another vessel, and carried on the cargo to the port of destination, there would have been a loss

on freight, to the amount of the freight paid to the vessel employed for this purpose, or to the amount of the *pro rata* freight for the part of the voyage not performed.(1) There seems, therefore, to have been a partial loss of freight in this case, unless it be assumed, that the owner of the goods could have declined, or did implicitly decline, to have his goods carried on in another vessel, or that they were so circumstanced that they could not have been reshipped within a reasonable time for this purpose. The court appear to have considered these facts as making a part of the case.

(1) 15 Mass.
Rep. 345.

If the freight be lost by the master's not carrying on the cargo to the port of destination, or offering so to do, when the ship is sufficient for this purpose, though a short delay for repairs may be necessary, it is not a loss within the policy.(2) The freight of a cargo of flour being insured from New York to Barcelona, the ship was stranded on Long-Island soon after sailing, in consequence of which the cargo was so much damaged, that it was not in a fit state to be reshipped for the voyage, and would not, if carried on, have been worth the freight at Barcelona. It was sold, however, at New York, for about double the amount of freight. The damage done to the ship was repaired in a few days. This was held not to be a total loss. Chief Justice Kent said, 'The assured had a right, on refitting the ship in due season, to insist on taking the cargo, or to be paid their full freight. Whether it would have been wise or foolish in the shipper, to have sent on the flour, in the condition it was in, was a question not to be put by the assured. It was none of their concern. The risk of the value of the cargo, at the port of delivery, lay with the owners of the cargo.' Accordingly, the whole freight would have been earned and due from the shippers personally, if the cargo had been transported in compliance with the charterparty, although it should have been of no value at the port of destination.(3)

The freight is lost by neglect to repair the vessel, and by not offering to carry on the cargo.

(2) Herbert v. Hallett, 3 Johns. Cas. 93.

(3) Griswold v. N. York Ins. Co. 1 Johns. 205; 3 Johns. 321.

It has already appeared that a loss of freight, occasioned by the loss of the cargo, in consequence of the perils insured against, is within the risks covered by the policy upon freight.(4) Accordingly, if the whole cargo be lost in consequence of the perils insured against, and thereby the earning of freight is wholly prevented, this will constitute a total loss of the freight, although the ship may perform the voyage without sustaining any injury. But if, in such case, another cargo can be procured for the voyage, or a part of it, the freight earned by the transportation of the substituted cargo, is considered to be in the nature of salvage, under the policy.

A loss of the cargo may occasion a total loss of freight.

(4) Supr. 290.

A ship having sailed upon the voyage on which the freight was insured, was compelled to put back; and the captain supposing it to be necessary, and for the benefit of the owners, sold both ship and cargo. Gibbs, C. J. 'If the ship had brought home another cargo, that would have been a salvage on the original freight, for though when the cargo was taken on board, the insurance was on that specific cargo; yet if the ship having been driven back to her original port of lading, had taken

If the freight of a cargo shipped is lost, it is a total loss, though another freight is earned.

If the shipping of a particular cargo is prevented, and another is procured, it is not a total loss.

(1) *Green v. Roy. Ex. Ass. Co.* 1 Marsh. Rep. 447; S. C. 6 Taunt. 68.

(2) *Everth v. Smith*, 2 M. & S. 278.

A total loss of freight, is a loss of what is at risk at the time.

(3) *Livingston v. Col. Ins. Co.* 3 Johns. 49. See also *Robertson v. Majoribanks*, 2 Starkie, 573.

another full cargo on board at a lower freight, the assured would have been entitled to have recovered the difference.'⁽¹⁾

In this case the policy is said to attach to the freight of a particular cargo, when it is taken on board, that is, the freight cannot be lost within the policy in consequence of the loss of the cargo, until the cargo is exposed to the risks insured against. Accordingly it was held that, when the loading of an intended cargo was prevented by a temporary detention of the ship, and another cargo was subsequently procured, and the freight of this cargo earned, it was not a total loss; the freight earned was not considered to be salvage.

Freight was insured from a port in the Baltic to Great Britain, and the vessel was detained in Russia so long, by an embargo, that the opportunity of earning the freight of a cargo intended to have been shipped, was lost, and no other cargo could be procured before the frost set in, by which the vessel was detained until the following spring, when other freight was obtained. In the mean time an abandonment was made. Lord Ellenborough said, giving the opinion of the court, 'A mere retardation of the adventure is not a substantive cause of loss, where the thing insured has not received damage; and whether the freight earned be the particular freight contracted for, or a posterior freight, makes no difference.'⁽²⁾

A total loss of freight, as of goods, is not necessarily a loss of the whole subject insured, but of all that is at risk at the time. A vessel was chartered for a voyage from Bourdeaux to New York, and thence to the river La Plata, and thence to Hamburg, for the sum of 18,000 dollars, one half of which was to be paid on arrival in the river La Plata, and the remainder on arrival at Hamburg. The freight was insured in New York. The vessel arrived at Buenos Ayres, where one half of the charter-money was paid, according to the agreement. She was there detained by an embargo, and during the detention, the freight was abandoned in New York. The interest in the whole freight was considered as having accrued, and it was held to be a total loss.⁽³⁾

As the half of the freight earned was paid, it made no difference whether it was considered to be a total loss of the whole, or only half of the freight agreed upon by the charterparty, since, if it was considered to be a loss of the whole, the assured was charged with one half, as so much salvage received by him. But if the freight due at Buenos Ayres had not been paid there, it might have been of importance whether it was considered to be a total loss of the whole freight, or only of the part then pending; since what had become due might not eventually have been paid by the freighters. It evidently was a total loss of only the part of the freight that was pending, that is, of one half of the whole freight. It was like a total loss of goods, where half of the cargo insured has been safely landed, and delivered to the consignee.

It has been held that an abandonment of the ship, does not take away the right of abandoning the freight, in case of a con-

constructive total loss by capture or detention, or sea-damage.⁽¹⁾ It is plain, that if the ship were not abandoned, in these cases, and being released or repaired, performed the voyage, and if the assured had a right to abandon the freight, and should avail himself of the right, the insurers would be entitled to the freight eventually earned, as salvage. The question then occurs, whether the assured can, by abandoning the ship, affect the rights of the insurers on freight; that is, whether he can, by this means, make what is a constructive, equivalent to an actual total loss of the ship, in its effect under the policy upon freight.

(1) Coolidge
v. Gloucester
Mar. Ins. Co.

Chief Justice Kent, giving the opinion of the court, upon an abandonment of freight during a detention, by capture, of a vessel which was also abandoned to the underwriters upon it, during the capture, but was subsequently acquitted, and earned freight, said, that the loss of the freight *pro rata*, earned subsequently to the capture, must fall upon the underwriters upon that interest. 'There are in this case conflicting rights, and some one must yield. The owner of ship and freight is authorized to insure each of them distinctly, and the law must have intended that each of the policies should have a full and effectual operation, according to the established principles of insurance. It would be to maintain a paradox, to contend, that by an abandonment of the ship, in such a case, the remedy upon the policy upon the freight was forever gone. One contract cannot be destroyed by the operation of another contract, *inter alios*. The insurer on freight must therefore submit to a total loss, in every such case, with the exception of the ratable freight, which does not go with the abandonment. The abandonment of the ship is an act in which he has no direct concern; and his contract with the assured contains no control of that act. The loss of any chance of recovery of the freight is a consequence *incidental*, merely, to the abandonment of the ship, and arises from meeting the paramount claims of the insurer on the ship.'⁽²⁾

(2) Davy v.
Hallett, 3
Caines, 16.

It does not appear upon what ground the circumstance, that this consequence is incidental, is of importance; nor can it be said, consistently with this doctrine, that the insurance upon freight is not affected by that upon the ship, for it is quite evident that the doctrine makes the insurers on the freight liable to pay a greater amount of loss on the whole, taking the salvage into consideration, than they would be liable to pay in case the ship had not been insured and abandoned.

The only principle upon which the doctrine can be supported, seems to be that which is virtually assumed in the above case, namely, that the insurers upon freight made their contract with the knowledge that the ship might be insured, and, in case of a constructive total loss, abandoned, whereby she would in fact be absolutely and totally lost to the assured on freight. The absolute total loss of the ship, under these circumstances, is therefore a direct legal consequence of a capture, or other constructive total loss, of which the insurer on freight may be presumed to have had notice, and in reference to which he may be supposed to have made his contract. The assured, by the

exercise of a legal right, of which the insurer on freight had notice, makes the constructive total loss of the ship an absolutely total loss. By a direct consequence of the peril, therefore, the chance of earning the *pro rata* freight subsequently to the accident, is gone.

This is certainly a doctrine of very great importance. The English cases, in general, support it directly, inasmuch as they assume that freight may be abandoned in case of a constructive total loss of the ship: though in some instances the judges intimate that the liability of the insurers upon freight cannot be affected by the act of the assured in abandoning the ship. This position is evidently inconsistent with the doctrine in question. But as the general implication of the English decisions is, that the rights of the assured, under a policy upon one interest, are not impaired by insuring another, and as the judges, in many instances, speak of this question as being one between the different sets of underwriters, and not between either set and the assured,⁽¹⁾ and as no doctrine has been any where proposed which may be substituted for this, in settling the cases to which this is applicable, the weight of authority is decidedly in favour of the doctrine in question.

(1) Davidson
v. Case, 8
Price, 559.

From the decisions above cited, it appears that this doctrine is distinctly recognised, and fully established in New York and Massachusetts. The cases applicable to this point will be subsequently cited more particularly, in considering the general effect of abandonment upon the different insurable interests.

Section 6. Of Profits and Commissions.

In respect to a policy upon profits, as it does not appear that any thing can be transferred by an abandonment of this interest,⁽²⁾ it seems to be questionable, how far the principles of constructive total loss are applicable to an insurance upon this interest.

(2) Supr. 387.

A policy being made upon the 'imaginary profit' of goods shipped at Bourdeaux for Hamburg; the ship was totally lost in the course of the voyage, but the cargo, except a barrel of indigo, was saved, and carried to Hamburg in another ship, at the expense of the underwriters. But this was held to be a total loss. Lord Mansfield said, 'The meaning of the policy seems to be that the ship and cargo shall arrive at the destined port, and is on the profit of that particular ship and cargo: but the market varies and may depend on twenty-four hours sooner or later; so that unless the very ship and cargo arrive, the profit may fail, and the insurance is lost.'⁽³⁾

(3) Henrickson v. Margetson, Marsh. Ins. 101; 2 East, 549 n.

In this case the goods were insured on board of a Bremen vessel, which took the case out of the statute against wagering policies. Mr. Marshall considers it a wager, and the principles of the decision are plainly those which are applicable only to wagering policies; though it does not appear that Lord Mansfield spoke of the policy as being a wager.

A subsequent case puts a construction upon this kind of policy as unfavourable to the assured, as that of Lord Mansfield is to the underwriter. In the case of a policy upon the profits of a cargo of slaves; the vessel was wrecked at the Bahamas, but a part of the slaves were saved, and carried on to their intended market. The assured claimed a total loss, to which he was entitled, according to the above rule laid down by Lord Mansfield. But Lord Ellenborough said, it did not appear that 'if the slaves had all got to a market any profit would have been produced;' Mr. Justice Lawrence, 'This case is defective in not showing there would have been some profit;' and Mr. Justice Le Blanc, 'Can we say there has been a total loss, when a great part of the cargo, the profits of which were insured, got safe to market?'(1)

A part of the goods arrive.

The arrival of a part of the cargo at the port of destination, seems to be a sufficient reason for not considering this to be a total loss; but the circumstance that a part was prevented, by the perils insured against, from arriving, was a reason for considering it a partial loss.(2)

(1) *Hodgson v. Glover*, 6 East, 316.

The profits of a cargo were insured from New York to Havre. The ship and cargo were captured and carried into England, where five eighths of the cargo were restored, but the voyage was relinquished. Under a policy on the cargo the assured had recovered a loss of three eighths. Under the policy on profits, it was the opinion of the court that 'the assured were entitled to a partial loss only. Profits are necessarily incidental, and subject to the final disposition of the goods. The assured have received five eighths of the goods. Whether they yielded a profit is not material, since the assured chose to accept them at London, and take the benefit of the market there. They are, therefore entitled, at most, to a loss of three eighths only.'(3)

(2) *V. Supr.* 418.

Three eighths of the goods being lost, the voyage is broken up at an intermediate port.

(3) *Loomis v. Shaw*, 2 Johns. Cas. 36.

Another case came before the same court respecting a policy on profits, on a voyage from Batavia to New York. The vessel was compelled to put into St. Kitt's, on account of sea-damage, where she could not be repaired to be made fit to bring the cargo on to New York, and both ship and cargo were sold there at auction, but it seems that both were bought in on account of the owners. The cargo was brought to New York in another vessel, the original vessel not being suitable for bringing the whole cargo. Upon the question, whether this was a total loss on the profits, Mr. Justice Kent said, 'Considering this an interest policy, I think it follows that there may be a partial loss. What shall be the criterion of an average or total loss in respect to profits, I cannot at present with clearness decide. Perhaps the established rule in respect to ship and cargo, of a loss of more than half the value, may be applicable. If so, the question here will be, whether the more profitable half of the cargo might not have been brought in the same ship to New York. I suggest this as a rule, which may perhaps apply, but without giving any opinion upon it.'(4)

Whether the rule of a loss of more than half applies to profits.

(4) *Abbott v. Sebor*, 3 Johns. Cas. 39.

The judge probably alludes to what had been said by Lord Mansfield,(5) as to the cargo being brought in the same ship.

(5) *Supr.* 430.

But as it seems that the goods arrived at the port of destination, where the assured had the opportunity of making profits, it does not appear that any part of the specific interest insured had been lost. The thing had happened, which the insurers undertook should not be prevented by the perils insured against. In respect to the distinction as to the arrival of the more or less profitable part of the cargo, this seems not to be a criterion of total loss. Suppose the less profitable part to have arrived, can the assured make the profit on such part, and also recover for the loss of it against the underwriters? A policy upon profits has no relation to the state of the markets, any more than a policy upon goods.

Whether an abandonment of the goods affects the liability of the insurers upon profits.

In case of the capture of a cargo, of which the profits were insured, the goods and the profits were abandoned to the respective underwriters upon each. Both the parties and the court appear to take for granted that a constructive total loss of the goods, constitutes a total loss of profits. The underwriters on profits objected, that the abandonment of the goods deprived the assured of the right of abandoning the profits, since, as the profits were a part of the goods, the assured had thus disposed of the whole subject of the policy upon profits. Mr. Justice Livingston, giving the opinion of the court, said, 'This is a dilemma which the underwriter should have foreseen at the time of his subscription. He must have supposed the cargo, in case of disaster, would naturally be abandoned to those who had insured it; nor is it reasonable in him to expect, that for the purpose of recovering on a small policy on profits, a merchant should, by not abandoning the cargo, forego his insurance on that subject. A double abandonment, as in this case, does not deprive the assured of his remedy on a profit policy.'⁽¹⁾

(1) *Mumford v. Hallett*, 1 Johns. 433.

The abandonment, in this case, transferred nothing to the insurers; it was of no effect, except as a notice of a claim of total loss. The court consider the loss of profits to have been, not constructively, but actually total. They say that the profits were insured, subject to the right of the assured to abandon the goods in case of a constructive total loss. The principle assumed is, that the abandonment of the goods, whereby the loss of profits is made absolutely total, is one of the direct consequences of the arrest and detention, for which the underwriters on profits are liable. The court say, the insurer must be presumed to have anticipated the abandonment of the goods in this case, by which is evidently meant, that it is one of the consequences of the risks insured against, for which he is liable. According to this doctrine, the principle of constructive total loss indirectly affects an insurance upon profits, by the right of abandonment which it gives in relation to the policy upon the goods. As to the profits, however, the loss is considered to be absolutely total; and it does not appear that there can be any constructive total loss upon this interest, except by a stipulation of the parties to the policy.

The doctrine as to a loss exceeding half of the value, can be applicable to a policy upon profits, only in the same way.

The loss of more than half of the goods in value, can give the assured the right of recovering for the loss of the whole of the profits, only upon the principle that such a loss gives the assured on profits the right of abandoning the goods; and where he exercises this right, it is one of the direct consequences of the peril occasioning the loss, for which the insurer on profits is answerable. Upon this principle, a loss of more than half in value of the goods and an abandonment, is, between the parties to the policy on profits, as it is literally and in fact, an absolutely total loss of the profits. But this doctrine has not been so generally settled and adopted by courts, as to be considered an established principle of insurance.

Under a policy on commissions, although the assured cannot assign to his underwriters the right to earn the commissions, it being a trust reposed in him, personally, by his principal; nor the demand for commissions earned and due, for as far as the commissions are earned, and have become absolutely due, the insurers are discharged; since the assured has so far gained what it was guaranteed he should not be prevented by the specified perils from gaining; yet, where the assured has done all that he was to do under the contract, to entitle himself to commissions, and yet the perils in the policy are in the way of his being finally entitled to receive them, there may be something to be abandoned.

Total loss of commissions.

A policy was effected 'upon the interest of William I. Robinson, being the allowance made with him as supercargo, as per agreement with the owners of the ship,' and the ship was disabled during the voyage, and the cargo sold at St. Kitts'. The right of the assured to recover upon the policy was considered by all the judges to turn upon the point, whether the assured, under the circumstances, had earned, and was absolutely entitled to, his commissions. If his demand against the owners had become absolute, there could be no question as to any constructive total loss.(1)

(1) New York Ins. Co. v. Robinson, 1 Johns. 616.

It does not appear that any thing can be transferred by an abandonment of commissions, except in the case of the assured's having done all that he agreed to do towards earning them; but his being absolutely entitled to them,(2) depends upon a future event, which may be intercepted by the perils insured against. In this case the rules relating to the abandonment of goods are applicable to a policy upon commissions.

(2) V. Supr. 388.

In other respects a policy upon commissions seems to be similar to one upon profits. As the assured can assign nothing by abandonment, he recovers, whether under an abandonment or not, according to his actual loss.

Section 7. Of different Subjects Insured in the same Policy.

In regard to the right to abandon a part only of the property insured; if only a part of it is at risk, and a total loss happens

Different interests in-

insured in the same policy.

upon this, it may be abandoned. This is a matter of daily practice. It has been made a question, whether the assured can abandon a part only of the property at risk under the policy. Ship, cargo, and freight, being insured in the same policy, the assured abandoned the ship only; and it was contended, on the part of the underwriters, that he could not abandon this interest separately. The court, however, gave no opinion on this point.(1)

(1) 3 Mass. Rep. 413.

(2) Coolidge v. Gloucester Mar. Ins. Co. 15 Mass. Rep. 341.

A policy being made upon ship and freight, valued separately, both were abandoned. The insurers accepted the abandonment of the ship, but refused that of freight; which implied an opinion on their part that they might be separately abandoned. The court had no occasion to express an opinion upon the point.(2)

(3) Hurtin v. Phœn. Ins. Co. Condry's Marsh. 601. n.

In a case before Mr. Justice Washington, upon a policy on the vessel and cargo; the cargo was abandoned separately, and the abandonment accepted by the insurers. The parties and the court appear to take it for granted that such an abandonment may be made.(3) These cases favour the doctrine, that where the amount insured, is insured indiscriminately upon different interests, one of the interests may be separately abandoned. But the point cannot be considered as settled. In most parts of the United States the question is not likely to arise, since different forms of policy are used for the ship and cargo.

If the insurance is made upon merchandise indiscriminately, a part cannot be separately abandoned.

In regard to a policy upon the cargo, if one sum be insured indiscriminately upon different kinds of merchandise, the assured cannot abandon a part only of the merchandise at risk under the policy. Insurance was made upon a part of a cargo, consisting of beef, butter, soap, candles, apples, and potatoes, on a voyage from New York to Charleston, against 'general average, and such total loss only, as might arise from the absolute destruction of the property.' The vessel was stranded, in the course of the voyage, on Barnegat Shoals, near Sandy Hook, and subsequently wrecked and totally lost. Some of the articles insured were saved from the wreck, but a part of them were stolen. The assured claimed the right of recovering for the articles stolen, or otherwise destroyed, in consequence of the accident. The court said, 'The idea that for each *item* or article of the cargo, which was totally lost, the underwriters are liable, is not well founded. The insurance was upon so much of the cargo as an integral subject.'(4)

(4) Guerlain v. Col. Ins. Co. 7 Johns. 527.

(5) Chap. 7. s. 7, 8, & 9.

(6) Disc. 1. n. 109, & 110.

(7) Des Assur. a. 47.

If different sums are insured in the same policy upon different parts of the cargo, one part may be separately abandoned.

It is said in Le Guidon,(5) that in case of insurance upon different kinds of goods in the same policy, the assured may make a separate abandonment of the whole of the same kind, if the damage exceeds half of the value, or renders the article unsaleable. Casaregis says, the sound and damaged goods must be abandoned together,(6) and he does not make the distinction as to the insurance being upon different articles. According to the French ordinance, the assured 'could not abandon one part and retain the other;'(7) and the French code provides against a 'partial abandonment.'(8) These provisions make it necessary to abandon all the goods, that are insured together without any distinction. But it is said, if different parts of a cargo

(8) L. 2. tit. 10. s. 3. a. 183.

belonging to one shipper, are insured by the same underwriters in different policies, the assured may abandon upon one policy only; for, says Valin,⁽¹⁾ the contracts have no connexion with each other; and upon the same principle, Emerigon,⁽²⁾ and Estrangin,⁽³⁾ say, that, notwithstanding the provisions of the ordinance and code, if a certain sum is insured on sugar, and another certain sum, in the same policy, on indigo, either of the articles may be abandoned separately, since this mode of insuring is equivalent to two policies.

Mr. Marshall says, 'If, in the same policy, articles be separately valued, I may abandon one article and retain the rest.'⁽⁴⁾ He cites Valin,⁽⁵⁾ and Pothier,⁽⁶⁾ for this doctrine, but nothing is said of a valuation by those writers in the places cited. It has been decided in New York, upon the authority of this passage in Marshall, and that of Le Guidon, Valin, and Emerigon, as cited above, in the absence of other authority, that a separate valuation gives the right of making a separate abandonment.

(1) Tom. 2. p. 109.
(2) p. 214. c. 17. s. 8.
(3) Poth. h. t. No. 132. n.

Whether goods separately valued may be separately abandoned.

(4) p. 600.
(5) a. 47.
(6) n. 132.

Insurance was made, for a voyage from New York to Fal mouth, 'on 150 boxes of sugar, valued at 6,650 dollars; 5 hampers of mace, valued at 5,700 dollars; and 4 tons of logwood, valued at 250 dollars. The vessel was compelled, by stress of weather, to put into the port of Philadelphia, where 131 boxes of the sugar were found to be wet and damaged, and wholly unfit to be carried on to the port of destination. The assured abandoned the sugar. A question was made whether he could abandon and recover for a total loss, on only this part of the merchandise insured and at risk. It was decided that he might make a separate abandonment of each article separately valued.'⁽⁷⁾

(7) Deidericks v. Com. Ins. Co. of New York, 10 Johns. 234.

Mr. Marshall, and the court in New York after him, take the ground that a separate valuation of parts of the merchandise, is equivalent, in respect to abandonment, to the insuring of different sums upon distinct parts of it; since, otherwise, the authorities cited are not applicable. But whether a distinct valuation is, in this respect, equivalent to a distinct insurance, seems to admit of some doubt. There is evidently a great distinction between insuring in the same policy 1,000 dollars upon indigo, and the same sum upon sugar, and insuring 2,000 dollars upon so many chests of indigo valued at 1,000 dollars, and so many boxes of sugar valued at a like sum. In the latter case, the valuation only fixes the prime cost; and the construction of the policy, as to its attaching to the subject, and as to return of premium for short interest, is the same precisely as if it had been an open policy upon indigo and sugar, the prime cost of which had been the sum at which they are respectively valued. But in the former case the construction as to the policy's attaching, and as to a return of premium, is the same as if the insurance were made by two policies. Where the policy is so made that the sum insured may be applied to either subject to any extent, the circumstance of a separate valuation of some articles seems not at all to distinguish the contract from an open

policy upon articles, the cost of which should be equal to the amount at which they are valued; and under such a policy, a part of the merchandise cannot be separately abandoned.

Section 8. The Existing Facts Constitute the Loss.

The assured is authorized to abandon only in case of a total loss. But where the property is at a distance, the question occurs, whether he is authorized to abandon upon intelligence of facts constituting a total loss, whatever change may have subsequently taken place, or whether the existing facts must constitute a total loss in order to make the abandonment valid.

Where property captured had been released before the abandonment, but was not known to the assured to be so, it was urged by the counsel for the assured, since Mr. Justice Jackson, that 'The right of the assured to abandon must depend upon the state of facts at the period of the last intelligence. The abandonment is made in reference to that period. If it refers to the actual state of facts at the time of the offer, whence arises the necessity of speedy election, after the receipt of the intelligence. If the obligation of the insurer depends upon the state of the case, as it actually exists in a distant country, although unknown to either party, then the obligations and the rights of the assured, must depend upon the same facts; and it is then of no importance whether he abandons sooner or later after receipt of the intelligence, since his right depends on the facts at the moment of his offer, not on those existing at any former period.'

'There is certainly a reciprocity in these rights and obligations. It is absurd to say that the assured is bound to make his election to-day, and that he is concluded by his offer to abandon; and yet that the underwriter may wait perhaps six months, (as would be the case in an India voyage,) to decide by future intelligence whether he is bound to accept.'

It was urged that the same principles ought to govern in abandonment, as in effecting insurance. 'An insurance, made after the sailing of the ship, is predicated upon the state of facts last known to the parties, and whether she was actually lost at the time of making the contract, or afterwards arrives in good safety, the parties are equally bound.'

Chief Justice Parsons stated, in the same case, that according to the custom then existing in Boston, [1808] the assured had a right to abandon according to the facts of which he had intelligence, and that the Circuit Court of the United States had acted upon that custom in one instance.⁽¹⁾

But the decisions on this point give the assured the right to abandon, only according to the facts at the time of abandonment. This question was considered in a case which occurred in England in 1808. The assured, hearing of the capture of his vessel, abandoned her; but she had in fact been recaptured

(1) Dorr v.
New Eng. M.
Ins. Co. 4
Mass. Rep.
224. 230.

In England
abandonment
can be made
only accord-
ing to the
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before that time, and was then in safety, subject only to the claim for salvage. Lord Ellenborough said, that, to give effect to the abandonment under these circumstances, would 'grievously enlarge the responsibility of the underwriters; it would be to make them answerable, not for the actual loss, but for a supposed total loss, which had in fact ceased to exist.' And all the judges were of opinion that an abandonment could be made, only according to the facts at the time of making it. They thought it inexpedient to extend the right of abandonment, and they supposed that the limiting the right to the state of facts was more conformable to the principle of indemnity.(1)

This opinion has been confirmed by other decisions.(2) But Lord Eldon seems to have entertained doubts on this subject, respecting which he reserved his judgment, by 'protesting against being considered as giving an opinion agreeing or not agreeing with these decisions.'(3)

This subject has been particularly considered by the supreme court of the United States. A vessel having been captured, was restored on the 9th of July. The assured having heard of the capture, but not of the restoration, abandoned to the underwriters on the 19th of the same month. In giving the opinion of the court, Chief Justice Marshall said, 'It appears to us to consist with the nature of the contract, which is a contract of indemnity, that the real state of the loss, at the time the abandonment is made, is the proper and safe criterion of the rights of the parties. Might they depend absolutely on the state of information, a seizure, which scarcely interrupted the voyage, might be, and frequently would be, converted into a total loss; and the contests respecting the real state of the information might be endless.'(4)

In New York it was decided, in a number of cases, that abandonment might be made according to the facts of which the assured had knowledge;(5) but this opinion was overruled in the court of errors, where it was held that an abandonment must be authorized by the facts existing at the time of making it;(6) and the courts of that state have adhered to this rule in subsequent cases.(7) 'The rights of the parties, says Chief Justice Kent, will be determined by the state of things existing at the time of the abandonment.'(8) And the same rule is adopted in Pennsylvania.(9)

The concurrence, in opinion, of so many courts, affords a very strong presumption in favour of this doctrine, notwithstanding the apparent doubts of Lord Eldon, and the opposite opinions formerly given in Massachusetts and New York.

It is said, in opposition to this doctrine, that an anterior risk may be insured against, and if the assured makes a fair disclosure, and violates no stipulation, he will be entitled to recover for a loss which had in fact happened before the policy was made. The representation is made, and the policy is subscribed, with reference to an anterior state of facts, and if the parties knew what had subsequently happened, they would not enter into the contract; since, if the property was safe, the owner would

- (1) *Bainbridge v. Neilson*, 10 East, 329; 1 Camp. 237.
- (2) *Farsons v. Scott*, 2 Taunt. 363; *Falkner v. Ritchie*, 2 M. & S. 290.
- (3) *Smith v. Robertson*, 2 Dow, 482.
- (4) *Marshall v. Del. Ins. Co.* 4 Cranch, 202. See also *Alexander v. Balt. Ins. Co.* 4 Cranch, 370.
- (5) *Mumford v. Church*, 1 Johns. Cas. 147; *Slocum v. United Ins. Co.* 1 Johns. Cas. 151; *Murray v. Unit. Ins. Co.* 2 Johns. Cas. 168; *Livingston v. Hastie*, 3 Johns. Cas. 293.
- (6) *Church v. Bedient*, 1 Caines' Cas. 21; *Hallett v. Peyton*, 1 Caines' Cas. 28.
- (7) *Penny v. N. York Ins. Co.* 3 Caines, 155.
- (8) *Schieffelin v. N. York Ins. Co.* 9 Johns. 26.
- (9) *Adams v. Del. Ins. Co.* 3 Binn. 287.

Objections to the rule limiting the right of abandonment to the existing facts.

not pay the premium, and if a loss had occurred, the insurer would not undertake to make indemnity. And it is said, that, to make the rule as to abandonment analogous to this practice, the assured ought to have the right to abandon, according to the state of facts at the date of his last intelligence.

But one of these rules is not necessarily involved in the other. Though parties may make a contract in reference to a previous state of facts, and a risk that has already been incurred, it does not follow that the assured ought to be entitled to indemnity, according to a previous state of a loss. There is no inconsistency in adopting one rule and not the other; since the two cases differ. In making insurance against a previous risk, the ignorance of the parties as to what may have taken place, is a condition of the validity of the contract. As to the obligation of the contract, past events, unknown to the parties, are the same as future events. They are able to contract, not merely because they do know what was the anterior state of the property and risk, but also because they do not know what has been the effect of the perils in the mean time. The ignorance of the parties of intermediate facts, is not a reason why a contract, relating to a past risk, should be made; it only takes away a reason why it should not be made, or rather why it could not be made. If the parties do not know the result of a past risk, they *can* contract respecting it; and then the question occurs, whether there is any legal objection to permitting such a contract.

There is no reason why parties should not be permitted to make a contract of indemnity relating to a past risk, provided it is fairly made. The grounds for allowing of such contracts, are precisely the same that they are for permitting insurance in respect to a future risk. If, therefore, there is any reason why abandonment on account of the former state of the property and degree of loss, as distinguished from the present, should not be allowed, it shows that the cases of contracting respecting past risks, and abandoning according to a former state of a loss, are not analogous in principle, although they resemble each other in relating to past events of which the parties are not informed.

The reasons for and against abandonment according to the existing facts, are drawn, for the most part, from the principle of indemnity. Where the property still remains, the damage which the assured has sustained by the perils insured against, can, in very many instances, be better ascertained from the existing, or from subsequent facts, than from any former condition of the property. Where it appears, by the intelligence, that the property, or a greater part of it, is irrecoverably lost and gone, this question does not arise; since, in such a case, the former state of facts shows what the present must be. If these facts constitute an absolute or constructive total loss, the assured is, no doubt, entitled to recover immediately for such a loss. It is only in relation to cases where the peril had not ceased to act, at the date of the last intelligence, and where the property still subsisted, that this question can arise.

It is, therefore, plain, that the rule of abandoning according to the existing facts, will, in general, more completely adapt the indemnity to the actual loss. But it may be asked, why should not the assured, in cases of capture and detention, wait for the condemnation of the property, or for the continuance of the restraint a certain time, before he has a right to recover for a total loss? And it would be difficult to give any reason why he should not. A provision to this effect is inserted in very many policies, and a rule which it is found to be expedient for the parties generally to agree upon, it is equally expedient to adopt as one of the principles of interpreting the contract, if it can be adopted. But a rule of this sort cannot well be framed and adopted by a court, without the interposition of an ordinance; such a general regulation must be of a positive nature, and is more properly a legislative, than a judicial act. But it is still better to leave it to the parties, since ordinances concerning the making or interpreting of contracts, ought not to be resorted to excepting in cases where some unquestionable and pressing evil is to be remedied.

It is said, in favour of abandonment according to the facts known, that insurance ought to afford the assured a speedy return of his capital. But, on the other hand, insurance is a contract of indemnity, and not of sale of the property insured. And one of these principles ought not to be lost sight of in following the other. A detention by superior force is no greater interruption of the adventure, than a detention for the same length of time, by adverse winds, or to repair sea-damage; and as far as it can be conveniently done, in either case, courts will prevent the assured from converting a contract of indemnity into one of sale.

On this ground there are very strong reasons for imposing a restraint upon the right of abandonment, by limiting it to the existing facts. The rule is put upon this ground by the courts, and though it operates unequally, according to the length of the voyage, yet it seems to be the only definite, convenient rule which is of easy application, that can be adopted upon the subject.

This rule affects the right of recovering for a total loss, in proportion to the distance of the property from the place where the abandonment is made. This distance is generally limited by the length of the voyage insured. Where any great delay of the assured's right of recovering for the loss, is occasioned by this rule, it is in voyages which were originally expected to occupy a very considerable time, and in adventures, therefore, in which a delay of a few months, more or less, is not very likely to derange the operations of the assured.

Another reason for not very speedily enforcing the claim for a total loss against the underwriters, is, that, in case of insurance upon the freight or cargo especially, if the detention has ceased before the abandonment, the freight may have been earned and received, or the goods have arrived at the intended market, and been sold, and the proceeds come to the use of the assured, be-

fore the abandonment is made; and the underwriter ought not to be compelled to pay the assured the value of the subject, and give him credit for the salvage. A rule is of doubtful expediency, in such case, which is founded upon the principle of suddenly winding up such wide and extensive concerns.

The rule, that the assured shall abandon immediately, is not at all inconsistent with the rule that the right depends upon the existing facts, since there is the same reason why he should be determined by the extent of the loss, and not by the state of the markets, whether the right of abandoning refers to the existing, or to a former state of facts. He will no doubt be influenced by the state of the markets, and the rate at which the property is valued, but the rule is intended to confine him, as far as it can be done, to the reasons arising from the extent of the loss; and where he has obtained the information on which he abandons, he ought to make an abandonment immediately, to whatever state of facts it relates.

Section 9. Upon what Intelligence Abandonment may be made.

As the assured must, at the time of abandoning, state the grounds upon which he makes the abandonment, it is necessary in order to make the act valid, not only that the existing facts should constitute a total loss, but also that the assured should be informed of the accident which occasions the loss. He cannot abandon merely upon the apprehension that a total loss may have taken place, and afterwards establish his right so to do, by facts that subsequently come to his knowledge, and which were wholly unknown to him at the time of making the abandonment. This raises a question as to the kind of information which will authorize an abandonment.

An abandonment made upon false intelligence is not valid.

Although an abandonment may be made upon intelligence of a total loss, and may be considered to be properly made, since the intelligence justified it, yet if the intelligence prove to be false, the abandonment will be a nullity. It is not enough that the abandonment is justified by the intelligence; it must be authorized by the facts of which the assured has intelligence. Lord Ellenborough says, 'The effect of an offer to abandon, is, that if the offer appear to have been properly made upon supposed facts, which turn out to be true, the assured has put himself in a condition to insist upon his abandonment. But it is not enough that it was properly made, upon supposed facts, if it turn out that no such facts existed. It may be said to be properly made upon notice received, and *bonâ fide* credited, by the assured, of his ship having been wrecked, whether such intelligence were true or not, and though the letter conveying it turn out to be a forgery; and yet clearly no right of action would rest in him, founded upon an abandonment made upon false intelligence. If the facts be all imaginary or founded in misconception, the whole foundation of the abandonment fails.'⁽¹⁾ In

(1) *Bainbridge v. Neilson*, 10 East, 341.

In one case the court said upon this subject, 'The information received by the assured, upon which the abandonment was made, was a mere newspaper account; and if information in any case, derived through such a channel, would be sufficiently authentic to warrant an abandonment, we think in the present instance it was too imperfect to afford sufficient *data* to the assured to calculate his actual loss.'⁽¹⁾

Abandonment upon intelligence through the newspapers.

(1) *Muir v. Unit. Ins. Co.* 1 Caines, 54.

The assured abandoned upon a *report* that the property was captured. Lord Ellenborough said, 'No certainty existed as to the capture at the time of the abandonment; but in cases like this, men must act upon probable information, and leave the effect of their acts to be determined by the eventual truth or falsehood of the intelligence they receive. If I hear of my ship's being taken in the East or West Indies, I am not obliged to wait till I certainly know the event by the testimony of those who were present. Provided the thing has once existed, what I do, believing it to have taken place, must be valid and effectual. If an abandonment is made where there has been no capture, of course it goes for nothing, however strongly the circumstance may have been reported. Assuming the fact, then, that the assured had reason to believe that their ship was captured, and they were acting *bonâ fide*, I think they were authorized to abandon, and that, as the ship proves actually to have been captured, the abandonment stands good.'⁽²⁾

Abandonment upon a report of the loss.

(2) *Bainbridge v. Neilson*, 1 Camp. 237.

Section 10. *Within what time Abandonment must be made.*

In all cases of total loss the assured may abandon, if he avails himself of the right in due time. While the total loss still continues he may abandon immediately on having intelligence of it, unless the policy contains some stipulation to the contrary.

(3) 8 Mass. Rep. 502; 10 Mass. Rep. 112, 347.

A provision is often inserted in the policy, that, in case of capture or restraint, the assured shall not abandon until the property shall be condemned, or until it shall be proved to have been under detention ninety days,⁽³⁾ or six months.⁽⁴⁾ This provision means, not merely that the assured shall not abandon within the ninety days, or other specified time, but that he shall have the right to abandon only for a restraint or capture that continues during such time;⁽⁵⁾ unless the property is sooner condemned.⁽⁶⁾

(4) 8 Johns. 237; 9 Johns. 1; 10 Johns. 273.

(5) *Dorr v. Un. Ins. Co.* 8 Mass. Rep. 502.

(6) *Ogden v. Col. Ins. Co.* 10 Johns. 273.

If the policy contains no provision in regard to the time within which abandonment is to be made, the assured must, on receiving intelligence of a loss, 'make his election speedily, whether he will abandon or not';⁽⁷⁾ he must 'give notice to the underwriters within reasonable time.'⁽⁸⁾ Mr. Justice Ashhurst says, he must 'signify his election the first opportunity';⁽⁹⁾ and Chief Justice Gibbs; 'he must elect in the first instance—the first instance means after the assured has had a convenient opportunity of examining into the circumstances, to ascertain what is the degree of damage—if the assured had treated it as in-

(7) *Allwood v. Henkell, Park*, 280.

(8) *Mitchell v. Edie*, 1 T. R. 608.

(9) *Ib.*

(1) *Gernon v. Roy, Ex. Ass. Co.* 6 Taunt. 383; 2 Marsh. Rep. 88. See also *Calbraith v. Gracie, Condy's Marsh.* 388. n. 406. n. 599. n.
 (2) *Hudson v. Harrison*, 3 B. & B. 106.
 (3) *Read v. Bonham*, 3 B. & B. 154.
 (4) *Ches. Ins. Co. v. Stark*, 6 Cranch, 273.

tending to pursue the adventure, after he knew the full extent of the damage, I should have thought that the abandonment was too late.'(1)

'The law is,' says Chief Justice Dallas, 'that the assured shall abandon in reasonable time, that he may not lie by to see whether it may be more for his interest not to abandon.'(2) But 'What is the reasonable time within which the notice should be given, must, in every case, depend on the circumstances of that individual case.'(3) 'This is a question,' says Chief Justice Marshall, 'which has not yet been reduced to such certainty as to enable the court to pronounce upon it, without the aid of a jury.'(4)

The rule as to a reasonable time, necessarily has reference to some purposes, for which it is so. The assured must of course have more or less time to make known his abandonment to the underwriters, according to the distance and means of communication; but the delay necessarily occasioned on these accounts, does not seem to be, exclusively, the reasonable time contemplated by the rule. And yet it does not appear for what particular purpose the assured may make any voluntary delay to abandon, after hearing of a loss, without losing the right to abandon upon the state of facts then known to him. It is plain that he must not make any delay for the purpose of learning the state of the market, or of taking advantage of a favourable change. Chief Justice Gibbs says, that if the assured delays with the purpose of pursuing the adventure, he will lose the right to abandon. But the assured must be supposed in every instance to delay with the intention of pursuing the adventure; the question being, whether he will pursue it, or throw it upon the underwriters. The meaning of the Chief Justice is, that where the delay to abandon can be attributed *only* to an intention of pursuing the voyage, the right of abandoning upon the state of facts then known, is forfeited.

When the assured is informed of a state of facts which authorizes abandonment, he must immediately make up his mind whether to pursue the adventure or not. The only question is, what time it is reasonable for him to take for this purpose? and this ought, certainly, to be very short; and the time that can be reasonably allowed, cannot be so long as to raise any question on this account, as to the abandonment's being seasonably made. Where the delay is so short as to raise the question, whether it was sufficient to give a man an opportunity to form an opinion upon a given state of facts, constituting a total loss, it can hardly be supposed that the abandonment would be out of time.

Any delay, long enough to make a question as to the loss of the right to abandon, must be justified by some other reason. The assured may delay to make abandonment on two grounds; where his information of the loss is imperfect, he may wait to obtain more definite and satisfactory intelligence; and where the peril still subsists, and is operating upon the property, he may wait for new circumstances, which are the direct consequences of the peril. If the ship is stranded, he may wait for an exami-

The assured can delay making abandonment only for the purpose of ascertaining new facts.

nation and survey to ascertain her situation, and the probability of her being got off; if she is arrested, he may wait with the expectation of her being released, or for the purpose of ascertaining whether she will be so or not. The right of abandonment is not lost by delay, for the purpose of ascertaining the extent of the loss or damage, or the probable continuance of the peril. By any delay, except what is occasioned by the distance, or difficulty of communication, the assured will lose his right to abandon on the facts then known to him, although such facts constitute a total loss. But the continuance of an embargo; or the condemnation of property captured; or the circumstance that a stranded ship is not made to float by lightening her; or the circumstance that nothing is heard of a missing ship, by waiting a still longer time, although she may before have been missing long enough to give the right of abandonment; are all new facts which show the extent of the operation of the peril, for intelligence of which, the assured may wait; and when such additional facts become known to him, his right to abandon revives. In general, therefore, if a question occurs as to the loss of the right of abandonment by delay, the inquiry is, whether other consequences have resulted from the peril subsequently to the first intelligence of the disaster, or whether additional facts have been ascertained, showing the extent of the loss.

The assured has, in different cases, been held to lose the right of abandonment by a delay of forty-five, (1) thirty-eight, (2) thirty, (3) or nine days; (4) where no reason could be given for the delay. But a delay of five months was in one case held not to be a forfeiture of this right; it appearing that during a very considerable part of that time, business was suspended, in consequence of an epidemic, in Philadelphia, where the insurance was made. (5)

The captain of a vessel which had been lost, arrived in London, where the assured resided, on the 25th of April. The papers relating to the loss, were handed to the assured on the 3d of May, and the abandonment was made on the 5th of that month. Dallas, C. J. 'There is no evidence of any communication to the owner, of the circumstances of the loss, previously to the arrival of the captain; and the notice having been given on the day but one after the owner was furnished with the full means of knowing all the facts of the case, must be deemed sufficient.' Burrough, J. 'No case has gone so far as to say, that not a single day must elapse between a knowledge of the loss and the notice of abandonment.' But Mr. Justice Richardson thought, that if the captain had any communication with the owner, after his arrival before the third of May, the abandonment was not seasonable. (6)

These cases, and all others indeed, relating to this subject, show that the assured must lose no time in making an abandonment, and that by any considerable unnecessary delay, he will forfeit his right to abandon, on the state of facts previously known to him.

(1) *Smith v. Newbp. Mar. Ins. Co.* 4 Mass. R. 688.

(2) *Barker v. Blakes*, 9 East, 283.

(3) *Savage v. Pleasants*, 5 Binn. 403.

(4) *Mellish v. Andrews*, 15 East, 13.

(5) *Bell v. Beveridge*, 4 Dall. 272.

A delay of two days held not to be a forfeiture of the right to abandon.

(6) *Read v. Bonham*, 3 B. & B. 147.

- (1) 9 East, 283; 15 East, 13.
 (2) 6 Cranch, 280; 5 Binn. 403; 4 Dall. 272; Calbraith v. Gracie, Condry's Marsh. 599. n.; Livermore v. Newbp. M. Ins. Co. 1 Mass. Rep. 264.
 (3) Roget v. Thurston, 2 Johns. Cas. 248.
 (4) Earl v. Shaw, 1 Johns. Cas. 313.
 (5) Steinback v. Col. Ins. Co. 2 Caines, 132.
 (6) Lawrence v. Sebor, 2 Caines, 207. See also Bohlen v. Del. Ins. Co. 4 Binn. 430; Brown v. Phœn. Ins. Co. 4 Binn. 445; Montgomery v. U. S. Ins. Co. 4 Binn. 445. & 469. n.
 (7) Tom v. Smith, 3 Caines, 245.

Principles upon which the decisions on this subject proceed.

In the incidental expressions of this doctrine in the English courts, no distinction is made of a case of capture or detention, from any other constructive total loss; (1) and some of the American cases imply that there is no such distinction. (2) Many of the American cases, however, and particularly those decided in New York, seem to adopt a different doctrine. Mr. Justice Radcliff, giving the opinion of the court in a case of capture, says, 'If the loss continues total, the insured may at any time abandon;' (3) and Mr. Justice Livingston, in a case of detention, where the assured did not abandon until fifteen months after the vessel was seized, said, 'It has been decided by this court, (4) that an abandonment may be made at any time after the accident, provided the loss continues total at the date of the abandonment;' (5) and Chief Justice Kent said, in another case, 'The time of abandonment is not material, since the loss remained total when the abandonment was made.' (6)

The judges in New York profess to deviate from the English doctrine. Mr. Justice Livingston, in giving the opinion of the court, said, 'In opposition to the positive regulations or practice of most maritime countries, and of England among others, where abandonment must be made in reasonable time after notice of loss, we permit the assured to lie by for years, in case of a capture or other technical total loss, provided the capture or other accident continues.' (7)

But it seems to be questionable whether there is any distinction in principle between the English and American cases in this respect. Whatever general expressions may have fallen from the American judges at different times, no direct opinion has, to my knowledge, been given in the United States in favour of the validity of an abandonment, where the assured delayed making it on the first news of the loss, not for the purpose of ascertaining the nature and extent of the loss, or probable continuance of the peril, but on account of the state of the markets, or any other reason, with which the insurers had no concern; and then abandoned on the same state of facts relating to the loss, for the purpose of throwing the loss, by the state of the markets, upon the insurers, or for any purpose not arising from the extent of the operation of the peril, or the nature and degree of the loss. The doctrine that the assured must abandon immediately, is recognised repeatedly in the American courts, and never denied in any instance, as a general doctrine; and if there is any such doctrine, it follows that the continuance of a constructive total loss, does not give a continued subsisting right of abandonment. The assured can abandon only while the loss is total, and to say that he may abandon at any time while the loss continues to be constructively total, is completely to shut out any doctrine as to seasonable abandonment.

Notwithstanding some apparent discrepancy in the general expressions used by the judges, I think the decisions, both in England and the United States, may be reduced to the principles before laid down, making allowance for some diversity of

opinion in the application of those principles to a given state of facts. Where the courts have considered the loss to be absolutely total, the property being, in the opinion of the court, swept away and destroyed by the peril, they have held the time of abandonment to be of no importance, since no abandonment was necessary; but they have not, in all instances, agreed as to the facts which amount to such a total destruction of the subject, as renders an abandonment unnecessary.

Where the assured has neglected to abandon, on the first news of the loss, and has afterwards abandoned on hearing of the condemnation of the property captured, or of any other fact showing that the damage was greater, or that the detention was likely to be of longer continuance, than he had reason to presume on the former intelligence, the abandonment has been held to be valid. But here again the courts have not, in all instances, agreed in their construction of the facts. In the application of this principle, as well as of all others, different judges may make different inferences from the same testimony. The difference of opinion, as far as there has been any, has related to the principles, or to the weight of evidence, rather than to the doctrines of insurance.

Where it has appeared to the court that the state of the markets, or any other reasons, having no relation to the extent of the peril or damage, was the inducement for delaying to make an abandonment in the first instance, and for making it subsequently, they have considered the abandonment as having no effect, and have held that the assured could recover only the amount of the actual loss or damage.

Both the English and American cases may, in general, I think, be brought within these principles. In regard to a case of capture or detention, no court can hold that, by neglecting to abandon on the first news of the arrest, the assured forfeits the right of recovering for the loss. If the arrest continues, without any condemnation of the property, or any proceedings respecting it, and without any prospect of its release, a court must either hold that a valid abandonment may be made subsequently to the first news of the loss, or that the assured may recover without any abandonment, since the contract is otherwise defeated. The authorities are pretty strong in support of the doctrine, that the assured cannot recover for a loss in such case without making an abandonment, unless the hope of recovering the property is wholly gone. If there is any hope of its being recovered, Chief Justice Kent says, 'The assured ought to renounce it [i. e. by abandonment] in favour of the insurers, or not recover at all' for the loss.⁽¹⁾ Whatever doctrine may be adopted in this respect, the rule permitting an abandonment is certainly more convenient, and more conformable to the principle of indemnity.

The doctrine requiring an immediate abandonment after news of a loss, seems to be more strictly enforced in England than in the United States. By many of the decisions it appears that in cases of arrest, as well as in other constructive total losses, the

(1) *Gracie v. New York Ins. Co.* 8 Johns. 183. Vid. Supr. 384.

The assured, having neglected to abandon on news of a cap-

ture, may abandon on hearing of the condemnation of the property.

The assured may abandon after an appeal from the sentence of condemnation.

(1) Mullett v. Shedden, 13 East, 304.
(2) Dorr v. Un. Ins. Co. 8 Mass. Rep. 494; Dorr v. New Eng. Ins. Co. 11 Mass. Rep. 1;
Earl v. Shaw, 1 Johns. Cas. 313; Bohlen v. Del. Ins. Co. 4 Binn. 430.

(3) Livermore v. Newbp. Mar. Ins. Co. 1 Mass. Rep. 281.

(4) Savage v. Pleasants, 5 Binn. 403.

(5) Mitchell v. Edie, 1 T. R. 608.

The right to abandon may be kept in suspense.

(6) Livingston v. Maryl. Ins. Co. 6 Cranch, 280.

assured must make abandonment without delay, or lose his right to abandon. But where the assured neglected to abandon on notice of capture, it was held that he might make abandonment on hearing of the condemnation of the property, though an appeal lay from the sentence of condemnation.(1)

It has been held in the United States also, that where the assured did not abandon immediately on receiving news of a capture, he might abandon on receiving intelligence of the condemnation of the property, though an appeal might have been made from the decree of condemnation.(2)

But it was held that where the only reason for delay to abandon in case of capture, appeared to be for the purpose of taking advantage of a favourable market, if it should prove to be such, the assured lost the right of abandonment by the delay. Chief Justice Dana said, 'The assured retains his knowledge of the capture for thirty days, and makes no communication to the insurers of the fact; then comes the very unexpected intelligence of a peace having been concluded, and he immediately makes his offer to abandon. Why was this neglected so long? Probably, because, from the contents of the letter from the captain, he expected that the vessel and cargo would soon be released, and that he should make a profitable voyage. This expectation being defeated by the news of peace, he turns about and makes his claim against the insurers for a total loss. It has been said, that the right of the assured to abandon remains while the loss continues total: this is *generally* true, but the rule is subject to some restriction;' and the court, for the reasons stated above, consider this case an exception to the rule.(3) A case has since been decided in Pennsylvania upon the same principles.(4)

A decision was given in England upon a similar principle. In case of a constructive total loss, and the sale of the property, the proceeds of which were not paid over to the assured by the person who had acted as agent of the parties concerned in receiving the proceeds, the assured abandoned, after the expiration of two or three years, for the purpose of transferring the claim against the agent, to the underwriters. It was held that the abandonment was too late, and could not have this effect.(5)

The right of abandonment may be kept in suspense by an agreement of the parties. Where the underwriters agreed, in case of capture, that the assured might take such measures as they should judge best for the interest of the parties, 'without prejudice to their rights;' the court understood this to be an agreement, on the part of the insurers, that the right of abandonment should be in suspense, and remain so, while the property continued to be detained, unless the agreement should be sooner determined by one of the parties; and accordingly that the assured might abandon at any time during the continuance of the detention by capture.(6)

Section 11. *Form of Abandonment.*

No particular form of abandonment is prescribed, and the form is said not to be material.⁽¹⁾ It is not necessary to use any form of words, and it has not been considered requisite as a general rule, that an abandonment should be made in writing.⁽²⁾

Lord Ellenborough thinks 'It would be very well to prevent parol abandonments entirely.'⁽³⁾ 'It is singular,' says Mr. Marshall,⁽⁴⁾ 'that an abandonment is not accompanied by any of those solemnities which such an act would seem to require.'

Although it would certainly be more convenient that abandonment should be made in writing, since, in all transfers of property, the purchaser wants some evidence of the purchase, yet an abandonment, by a mere oral declaration, is held to be valid and effectual.⁽⁵⁾ The written contract of the parties may render it necessary to abandon in writing. But policies of the usual form contain no provision in this respect. It is the practice, in many places, to make abandonment in writing; it does not, however, appear by any decided case, that such a custom authorizes the insurers to demand that the abandonment should be so made.

In whatever manner an abandonment is made, it must be positive and absolute. The French code provides against any conditional abandonment.⁽⁶⁾

The rule is the same in England and the United States.⁽⁷⁾

Lord Ellenborough says, 'An abandonment must be express and direct. I think the word *abandon* should be used to render it effectual.'⁽⁸⁾ It was held in Pennsylvania, that a declaration by the assured, in a letter to the underwriters, that he *meant* to abandon, was an abandonment; the construction put upon the letter being that he meant *thereby* to abandon.⁽⁹⁾

A question has been made, whether a demand for a total loss, is an abandonment.^(a) A letter to the underwriters containing a statement of the loss, and enclosing an account of the sale of the property, and claiming the balance of the amount insured, after giving credit for the salvage, was held to be a sufficient abandonment.^(b)

But Lord Ellenborough was of opinion that the demand of a total loss did not amount to an abandonment. When the broker communicated to the insurers on freight that the voyage had been broken up by capture notwithstanding a recapture, and required them to settle as for a total loss, and to give directions as to the disposition of the salvage, he thought this did not amount to an abandonment. He said, 'There is no implied abandonment by a demand of a total loss. If parol abandonments are allowed, I must insist upon their being expressed. An implied parol abandonment is too uncertain, and can-

Abandonment need not be made in any particular form.

(1) *Bell v. Beveridge*, 1 Binn. 52. n.; *Emer. t. 2.* p. 175.; *Sydney v. Mar. Ins. Co.* 1 Johns. 190; *Marsh. Ins.* 599; 1 *Yeates*, 406.

(2) *Duncan v. Coates*, 3 *Yeates*, 378. (3) *Parmeter v. Todhunter*, 1 Camp. 541. (4) p. 599.

The abandonment must be absolute.

(5) *Read v. Bonham*, 3 *Brod. & Bing.* 147. (6) *Code de Commerce*, l. 2. t. 10. s. 3. a. 183.

Whether a demand of a total loss is an abandonment.

(7) 1 *Johns.* 181.

(8) 1 *Camp.* 541.

(9) *Bell v. Beveridge*, 4 *Dall.* 272. 1 *Binn.* 52. n.

(a) *Watson v. Ins. Co. of N. A.* 1 *Binn.* 47; *Calbraith v. Gracie. Condy's Marsh.* 599. n. (b) *Idle v. Roy. Ex. Ass. Co.* 3 *Moore's Rep.* 115. But see *Tunno v. Edwards*, 12 *East*, 488.

(1) *Parmeter v. Todhunter*, 1 Camp. 541. not be supported. The abandonment must be express and direct; and I think the word *abandon* should be used to render it effectual.'(1)

In respect of a policy 'against total loss only,' Mr. Justice Sewall said, 'If a loss had been proved in this case, total in its own nature, and in the sense of the parties to the contract, a statement of the salvage remaining, is all that would be requisite, in my opinion, to the claim of the assured to a total loss; that is, to enable him to recover the sum insured, deducting the amount of salvage. In this opinion, however, my brethren do not concur with me.'(2)

(2) *Murray v. Hatch*, 6 Mass. Rep. 478.

A total loss can be claimed only upon the grounds made known to the insurers at the time of making abandonment.

The underwriters ought to know the grounds of the abandonment, that they may determine whether to accept. The provisions of the policy usually make it necessary to state the grounds, since the underwriters agree to pay the loss only after *proof* of it. Accordingly the assured must, at the time of making abandonment, make known to the insurers the reasons for which he abandons. He cannot avail himself of any other ground than that alleged by him at the time of abandoning, and if there be any other facts, either known or not known to him at that time, on which an abandonment would be necessary in order to entitle him to recover for a total loss, he must abandon anew before he can recover for such a loss on account of those facts.(3)

Whether the assured must make a written transfer of the property abandoned.

(3) *Suydam v. Mar. Ins. Co.* 1 Johns. 190; 2 Johns. 138; *Dorr v. N. E. M. I. C.* 4 Mass. Rep. 230; *Ralston v. Un. Ins. Co.* 4 Binn. 400, 403.

(4) *Ches. Ins. Co. v. Stark*, 6 Cranch, 272.

(5) *Hurtin v. Phœn. Ins. Co. Condy's Marsh.* 601. n.

A deed of cession of the property has been held not to be an essential part of an abandonment. Where the agent of the assured had abandoned, by a letter to the underwriters, and afterwards executed a deed in behalf of his principal, transferring to them all the assured's interest in the goods, the validity of the abandonment was brought into question, partly on account of an alleged informality of the deed. Chief Justice Marshall, giving the opinion of the court, said, 'The informality of the deed of cession is thought unimportant, because, if the abandonment was unexceptionable, the property vested immediately in the underwriters, and the deed was not essential to the rights of either party. Had it been demanded, and refused, that might have altered the law of the case.'(4)

Mr. Justice Washington, however, was of opinion, that where the insurers accepted the abandonment, but at the same time required a deed of cession and transfer, the assured might recover for the loss without making such a deed.(5)

But this opinion was given upon the ground that the abandonment gave the insurers all the rights and advantages of ownership of the property; for it can hardly be doubted, that where the property should be so situated, in consequence of the peril by which the loss was occasioned, that the insurers could not, without a written transfer or authority from the assured, establish their claim to the salvage, that a court would consider the making such transfer, or giving such an authority, a condition upon which the right to recover the amount insured should depend. It has been said, that the assured shall be charged in a total loss with as much of the property as might have been saved, but for his fault or negligence. Upon the same principle,

if the assured, by not vesting the insurers with the necessary powers, or giving a requisite title, prevents them from recovering the salvage, what they so lose ought to be deducted from the amount which he would otherwise recover.

But the necessity and importance of any written transfer or authority, would evidently depend upon the nature of the interest abandoned, and the particular circumstances of the case. The laws of most countries, for instance, make some forms of transfer requisite, in order to entitle a vessel to certain privileges; and if, in case of abandonment for detention, the assured should refuse to transfer the vessel to the underwriters by a legal bill of sale, he would, by this refusal, so far deprive them of the right of salvage; and, in such case, he certainly ought, either not to be entitled to recover for a total loss, on the ground that he had waived his abandonment; or the amount, by which the value of the vessel to the underwriters was diminished by this refusal, ought to be deducted, in fixing the amount of the loss, in the same manner as if a part, or the whole of the salvage, had been retained by the assured, and gone to his use.

An abandonment made for a sufficient cause, operates as an assignment of the interest, although it wants formality in some respects, if the underwriters waive any objection on this account.(1) Mr. Justice Washington was of opinion, that the underwriters, by calling for the papers to prove the loss, where a total loss was demanded, dispensed with any more formal abandonment.(2)

Where the assured claimed a total loss, in a conversation between him and the underwriter, which implied that an abandonment had been made; and a new policy was effected on the same risk, with an agreement that the claim of the assured, under the former policy, should not be thereby prejudiced; this was held to be sufficient proof of an abandonment.(3) And where the assured claimed a total loss, and the underwriters made payments upon his claim, they were considered as thereby dispensing with any more formal abandonment.(4)

An acceptance of an abandonment will, no doubt, have the effect of waiving any objection to the abandonment, on account of any insufficiency in form.

Defect in the form of the abandonment may be waived.

- (1) *Watson v. Ins. Co. of N. A.* 1 Binn. 47.
- (2) *Calbraith v. Gracie, Condy's Marsh.* 599. n.
- (3) *M'Kintire v. Bowne*, 1 Johns. 229.
- (4) *M'Lellan v. Maine F. & M. Ins. Co.* 12 Mass. Rep. 246.

Section 12. Acceptance of Abandonment.

Although an acceptance may supply any merely formal insufficiency in the abandonment, an acceptance is not, in any other respect, necessary to its validity and effect; being made in due form, and for sufficient cause, it transfers the subject, and perfects the assured's right to recover for a total loss, although it is not accepted by the insurers. Whether this right may be divested by posterior events will be subsequently considered.

An acceptance, to be binding upon the insurers, must be made by persons authorized for this purpose. Where it was provided, by the act incorporating a company, that 'no losses should be

The abandonment is valid without any acceptance.

An acceptance must be made by persons authorized.

(1) *Beatty v. Mar. Ins. Co.*
2 Johns. 109.

The silence of the insurer is not an acceptance.

(2) *Peele v. Mer. Ins. Co. C. C. U. S. Mass. Oct. 1822.* 2 Mason's Rep. 22.

(3) *Hudson v. Harrison*, 3 B. & B. 97.
See also *Smith v. Robertson*, 2 Dow, 474.

paid without the approbation of at least four of the directors, with the president and his assistants, or a majority of them ;' it was held that an agreement by only the ' president and assistants,' without the four directors, to pay a total loss, was not such an acceptance as bound the company.(1)

The insurer need not expressly accept, or decline to accept, an abandonment. As his accepting is not necessary to its validity, an immediate acceptance is not of great importance to the assured. Since a general, uncertain, and loose kind of evidence, must, from the nature of the case, be admitted to be sufficient preliminary proof of a loss ; the underwriter is not always able to form a satisfactory opinion, on the proof at first produced, whether the loss is total. Accordingly he is not construed by his silence, merely, to accept the abandonment. He 'is not bound,' says Mr. Justice Story, 'to signify his acceptance. If he says nothing, and does nothing, the proper conclusion is, that he does not mean to accept.'(2)

In a few instances, however, the silence of the insurer has been construed to be an acceptance of the abandonment. Chief Justice Dallas, speaking of a case in which the underwriter had not, during three months after an abandonment, expressly accepted or refused to accept it, nor consented to the appointment of an agent to look after the property, said, 'If the law were to compel the assured to give the earliest notice of abandonment, and at the same time to allow the underwriters to lie by and afterwards refuse to accept it, there would be no mutuality of obligation between them. Here the notice was given in December, and the insurers, after having done nothing during nearly three months, interpose,' [with notice that they did not accept the abandonment, and should not authorize a sale of the property.] 'Where there are circumstances to show an acquiescence, it is not allowable for the underwriters, after such an acquiescence, to come forward and interfere. I think there was such an acquiescence here.' Park, J. 'Here is enough to satisfy the court that there was an acquiescence, or silence on the part of the underwriters ; which admits that the assured was acting in the best way for all ; and this acquiescence completed the right of abandonment.' Richardson, J. 'If the underwriters intended to resist the abandonment, they should have taken the step with more promptitude, instead of waiting two months.'(3)

But the doctrine above laid down, by Mr. Justice Story, that if the insurer lies by, and neither does, nor says, any thing, it shall not be construed into an acceptance, or acquiescence in the abandonment, seems to be generally implied, very distinctly, in the cases on this subject. When the assured demands payment of the loss, it is necessarily understood whether the underwriter accepts the abandonment, and in ordinary cases, this is as soon as a knowledge of the fact is of importance to the assured. An abandonment is, however, in the greater number of instances accepted or rejected within a short time. But any rule on this subject would evidently be of no effect, since, if the silence of the underwriter were construed into an acceptance, he would in all cases expressly decline to accept.

There is no established prescribed mode of accepting, any more than of making, an abandonment. Whether the insurer accepts or not, is a matter of construction of his words and conduct. Any act done for the purpose of making the most of the property, to whomever it may prove to belong, ought not to be construed against the party who thus consults the common interest.

There is no particular form of acceptance.

Accordingly, where an agent of the insurers on freight, 'superintended and directed the unloading of the ship, and employed persons for that purpose,' this was not construed to be an acceptance of the abandonment.⁽¹⁾

(1) *Griswold v. N. Y. Ins. Co.* 1 Johns. 295; 3 Johns. 321.

Where the assured stated to the underwriters upon sugars, the damage the sugars had sustained by the stranding of the ship, and they in answer, desired 'that the assured would do the best they could with the damaged property;' Lord Kenyon held that this was not an abandonment and acceptance. 'It was the interest of the underwriters to make the partial loss as light as possible, and it was the duty of the assured to do so; and this was the meaning and import of the letter.'⁽²⁾

(2) *Thelluson v. Fletcher*, 1 Esp. 73.

It has been held, that the acts of the insurers may be a proof of their acceptance, though they declare at the same time that they do not intend to accept.

Acts of the insurer construed to be an acceptance, against his declaration.

'Whenever the underwriter,' says Mr. Justice Story, 'does any act in consequence of an abandonment, which could be justified only under a right derived from it, that act is, of itself, decisive evidence of an acceptance. If he should proceed to sell the vessel, with an express protest against the acceptance, and a declaration that he did it for the benefit of the owner, his act would conclusively bind him.'⁽³⁾

(3) *Peele v. Merch. Ins. Co. C. C. U. S. Mass.* Oct. 1822. 2 Mason, **.

The appointment of an agent to get off a stranded ship, or to sell her, and the taking possession of the ship for the purpose of getting her off, and subsequently keeping possession of her, though for the purpose of repairing her for the use of the assured, was construed by the same judge, to be an acceptance of the abandonment.⁽⁴⁾

The insurers take possession of the ship to repair her.

(4) *Ib.*

A payment under a demand for a total loss, has been held not necessarily to be proof of an abandonment and acceptance. The assured hearing of the seizure of the goods insured, at a foreign port, before receiving documents to prove the loss, claimed from the underwriters the payment of the amount of their subscriptions, but made no formal abandonment. The underwriters paid 50 per cent of the amount subscribed, and an endorsement was made upon the policy, '*adjusted a return for loss of 50 per cent on account.*' This was held not to amount to an abandonment and acceptance.⁽⁵⁾ But it is to be observed that the payment was made in this case, without a particular knowledge of the nature and extent of the loss.

Payment on a demand for a total loss.

(5) *Tunno v. Edwards*, 12 East, 488.

Section 13. Revocation of Abandonment.

The parties may doubtless annul an abandonment, by their consent and agreement to this effect. 'If the assured,' says Chief Justice Reeve, 'wishes to waive his abandonment, there must be the consent of the insurer. An abandonment is irrevocable without his consent.'⁽¹⁾ But where the insurers allege and insist upon a revocation of the abandonment by the assured, they are not usually required to show that they assented at the time of the alleged revocation; though the assured might perhaps show that they dissented, and thereby defeated his intention of revoking the abandonment.

The ship abandoned, is afterwards sold by the assured on their own account.

Where the assured bought in the ship, in case of her being sold by the captain on account of sea-damage, and subsequently sold her on their own account, it was held to be a waiver of any claims they had acquired against the underwriter by making an abandonment.

A voyage was broken up in consequence of sea-damage, and the ship sold by the captain, and 'purchased by the supercargo, who was part owner of ship and cargo. He purchased her in behalf of the owners; and on her return to New York, the owners affirmed the purchase, and sold the ship for their own benefit. 'This,' said Mr. Justice Kent, 'was a waiver of any claim for a total loss on the ship. It is like the case of *Saidler v. Church*, in which it was held that if the assured, after abandonment, affirm the purchase of the vessel by the captain, he waives his abandonment.'⁽²⁾ The principle of this decision seems to be, that the assured, from all the circumstances, appeared to treat the loss as partial, which proved to be so in fact; and therefore he should not abandon and recover for a total loss.

(2) *Abbott v. Sebor*, 3 Johns. Cas. 45.

The assured's selling the ship, is not necessarily a waiver of an abandonment.

In a subsequent case it was held, that the assured's selling the ship after an abandonment for sufficient cause, was not necessarily a revocation of the abandonment. The underwriter refused to accept an abandonment of the ship, made for sufficient cause, and the assured sold the ship at public auction, with the view of turning the property to the best advantage. Mr. Justice Thompson, giving the opinion of the court, said, 'The assured, by operation of law, became the trustee and agent of the underwriter. To consider the mere sale of the subject, by the assured, for the avowed benefit of the underwriter; after a refusal to accept a rightful abandonment, a waiver of such abandonment would, it appears to me, be against the principles of justice and sound commercial policy. If the subject was of a perishable nature, a total loss must be the consequence. The assured being made trustee *ex necessitate*, if he executes his trust with fidelity, it is all the law requires of him. And whatever he does, ought to be considered as done in the character which the law has imposed upon him, unless his conduct shows clearly that he intended to act for his own benefit, and to waive his abandonment. The *quo animo* is the criterion by which his acts ought to be tested.'⁽³⁾

(3) *Walden v. Phœn. Ins. Co.* 5 Johns. 310. See also *Livingston v. Hastie*, 3 Johns. Cas. 293; *Lawrence v. Van Horn*, 1 Caines, 285.

The assured, on receiving intelligence from the government agent at Barbadoes, that the crew of their ship had mutinied, and brought the ship into Barbadoes, and that it had come into his hands, and he had sold the cargo and stores; wrote to him to forward 'the sales, and a remittance of the proceeds of the ship and cargo.' On receipt of this letter he sold the ship. The assured had abandoned on receiving intelligence of the loss. It was contended that, by their interference, in regard to the disposition of the property, the assured had revoked the abandonment. But Lord Eldon was of opinion that they had not, by this act, waived the rights acquired by the abandonment.⁽¹⁾

Ordering the sale of the cargo, and a remittance of the proceeds, held not to be a revocation of the abandonment.

(1) *Brown v. Smith, 1 Dow, 349.*

But if the assured unnecessarily involves the property in new speculations and enterprises, he is considered as receding from his abandonment. This is usually called *doing acts of ownership*, as distinguished from the superintendence intended merely for the preservation of the property. Chief Justice Marshall says, 'If, after abandonment, any particular instructions had been given by the assured, as to contracts concerning the goods, if any act of ownership had been exerted by him; such conduct might be construed into a relinquishment of an abandonment which had not been accepted.'⁽²⁾

Unnecessarily involving the property in new speculations is a waiver of an abandonment.

(2) *6 Cranch, 272.*

In case of a vessel, that was abandoned on account of detention by an embargo, there being no question made by the court as to the right to abandon, the assured gave notice to the underwriters, that unless they would accept the abandonment, and pay a total loss, he should cause the vessel to be sold for the benefit of whom it might concern; and receiving no answer, he caused the vessel to be sold at auction, and purchased her himself, at about one third part of the sum at which she was valued in the policy, and immediately chartered her for a voyage. The court said, 'The assured, when he abandons and claims a total loss, and is reduced to the necessity of a sale of the subject, cannot purchase it, on his own account, without waiving the abandonment. If he persevere in the claim for a total loss, he must surrender to the insurer the benefit of the repurchase; and this rule is founded in sound policy, to prevent fraudulent speculation upon a loss, at the expense of the insurer.'^(a)

Despatching the ship on another voyage, is a revocation of an abandonment.

'If after abandonment,' says Mr. Justice Story, 'the owners were to proceed to repair the ship, without consultation with the underwriters, it would be a waiver of the abandonment.'⁽³⁾

If the assured repairs the ship, it is a waiver of his claim to recover for a total loss.

Under a policy upon commissions, the assured's proceeding upon the voyage and earning commissions, has been held, in Pennsylvania, not to be a waiver of the rights acquired by an abandonment made during detention in the course of the voyage. Insurance was made upon a supercargo's commissions, 'valued

(3) *Peele v. Merch. Ins. Co. C. C. U. S. Oct. 1822. 2 Mason, 22.*

(a) *Ogden v. Firem. Ins. Co. 10 Johns. 177; 8. C. in Err. 12 Johns. 25.* See also *Saidler v. Church, 2 Calnes, 244.* What is said in the above case, of the assured's surrendering to the insurer the benefit of the repurchase, was probably suggested by the provision of the French ordinance; but it does not appear to be applicable here. A sale by the assured to himself, is plainly a mere ceremony.

(1) *Parker v. Towers*, 2 *Browne*, App. 80.

at 7000 dollars, free of average, and without benefit of salvage, on a cargo from Philadelphia to Lagaira. The vessel was captured on the 11th of April, and carried into Curraçoa, and there detained until the 25th of July, when a compromise was made with the captors, and about ten per cent in value, of the cargo, was left at Curraçoa as security for the fulfilment of the terms of the compromise. An abandonment had been made in Philadelphia, on the 18th of July. The cargo was also abandoned, on account of the capture, to the respective underwriters upon it. The supercargo proceeded upon the voyage, after the release of the vessel, and received, for making sale of the cargo, and investing the proceeds, commissions equal in amount to those originally stipulated for, and which had been insured, at the value of 7000 dollars, in the policy. As average and salvage were excepted by the contract, the questions arising upon these facts were, whether this was a case which authorized an abandonment and claim for a total loss, on the 18th of July, and if it was such, whether the supercargo, by subsequently proceeding upon the voyage, and receiving commissions equal in amount to those, on account of which the insurance was made, had waived the rights, if any, acquired by the abandonment. It was held that this was not a wagering policy; and as a consequence, that these facts constituted a total loss; and that the supercargo's proceeding, and earning commissions, was not a revocation of the abandonment.⁽¹⁾

Section 14. Whether an Abandonment may be Defeated by subsequent Events.

It has been a question, much considered, both in England and the United States, whether an abandonment seasonably made for sufficient cause, fixes the rights and liabilities of the parties; or whether the right of the assured to recover for a total loss, in such case, may be devested by subsequent events. In regard to this question, Lord Mansfield said, the action of the assured 'must be founded upon the nature of his damnification, as it really is, at the time the action is brought. It is repugnant, upon a contract of indemnity, to recover as for a total loss, when the final event has decided that the damnification in truth is an average, or perhaps no loss at all.' And although there had been no abandonment, while a total loss continued in this case, yet Lord Mansfield implies what would have been his opinion of such a case; he says, 'In case of the ship being taken, the assured may demand for a total loss, and abandon, provided the capture, or total loss, occasioned thereby, continue to the time of abandoning and bringing the action.' But he finally reserves his opinion on this question, by saying, 'The assured can only recover an indemnity, according to the nature of his case, at the time of the action brought, or, at most, at the time of his offer to abandon. We give no opinion how it would be in case the ship or goods be restored in safety, between the offer to aban-

don and the action brought; or between the commencement of the action and the verdict.⁽¹⁾

(1) *Hamilton v. Mendes*, 2 Burr. 1198.

In one of the Russian embargo cases, where freight was abandoned during the detention of the vessel, and she was afterwards liberated and earned freight, the court held that the assured could not recover for a total loss; that is, his right to recover for such a loss was divested by a subsequent event. But in this case, Lord Ellenborough said, the freight was lost to the assured by their abandonment of the ship, 'which abandonment was the act of the assured themselves, with which, and the consequences thereof, the underwriters on freight have no concern.'⁽²⁾ Considering this to be the ground of the decision, the case is not a direct authority to our present purpose, but the court afterwards considered this case as deciding that subsequent events, happening independently of the agency of the assured, may divest his right to recover for a total loss.

(2) *M'Arthy v. Abel*, 5 East, 397.

In another case, Lord Ellenborough, speaking of the arguments of counsel, said, 'It is there said that if the right of abandonment once vested and be exercised in time, it cannot be divested by subsequent intelligence. But the case of *M'Arthy v. Abel*, shows the contrary; for there, though the notice of abandonment were well made, it was divested by circumstances, which happened after the notice of abandonment had been given.'^(a) The court thus very distinctly adopts the doctrine, that an abandonment may be defeated by subsequent events.

Lord Eldon, speaking of the effect of subsequent recapture, in defeating an abandonment, said, cases had been stated 'with respect to what would be the law if the recapture were known between the offer to abandon and the action brought; if known between the institution of the action, and the judgment, or between the judgment and execution, or payment; and it was curious that while those who had been most concerned in settling what was the law on this subject, had taken great credit to themselves for its certainty, it might perhaps be found, when the matter came to be examined, that there was as much uncertainty on this subject as in any other branch of the law.'

The case under consideration was an appeal from a judgment given in Scotland, that an abandonment made for a sufficient cause fixed the rights of the parties, and could not afterwards be defeated without their consent; and Lord Eldon evidently agreed with the Scotch court, for he plainly intimates that if the judgment of the House of Lords were given upon this point, it would confirm the opinion of the Scotch court, and overrule that given by the court of King's Bench, in *Bainbridge v. Neilson*, cited above; but the case was decided upon a different point.⁽³⁾

(3) *Smith v. Robertson*, 2 Dow, 474.

In another case of abandonment and subsequent recapture, Lord Ellenborough said, 'Although Lord Eldon is said to have spoken with dissatisfaction of *Bainbridge v. Neilson*, in the

(a) *Bainbridge v. Neilson*, 10 East, 342. Lord Ellenborough had said to the jury, at the trial of this case, 'The abandonment stands good notwithstanding the recapture.' 1 Camp. 237.

(1) *Patterson v. Ritchie*, 4 M. & S. 393.

House of Lords, I confess, with all deference, I am unable to see any good reason for receding from that judgment. The principle of that decision is this: I have a right of action for nonpayment of money; the party pays me before action brought; that takes away my right of action.' Bayley, J. 'It appears to me the assured can only recover in respect of that which constituted a loss at the commencement of the action.'⁽¹⁾

But the recovery of a ship, that had been captured, was held by the same court, not to defeat an abandonment made on account of the capture, where the loss continued to be total, notwithstanding the recovery of the ship. A ship upon a voyage from Liverpool to Sierra Leone, was captured by a French frigate. The captors left on board only the master and fourteen of the crew, and plundered, and threw overboard, a considerable part of the cargo, a greater part of the ship's stores, provisions, and water, and thirteen out of sixteen of her great guns, all her small arms, and all her ammunition, her long-boat, instruments, register, and all her papers except the log-book. The French commander then put on board of her twenty-one of the crew of a Portuguese schooner which he had burnt, and fourteen British sailors, and put her under the command of the master of the Portuguese schooner, and ordered him to make for the nearest land, which was Buona Vista. A supply of provisions was obtained at Buona Vista, by bartering a part of the cargo left on board by the French. The vessel then sailed for Madeira, but the crew grew ungovernable, and were often drunk, and rose and insisted on going to the Western Islands. The ship accordingly proceeded to Fayal. There was no discipline on board; but what command there was, was exercised by the British captain, who originally sailed in the ship on the voyage insured,

At Fayal, the Portuguese captain laid claim to the vessel, and the remainder of the cargo, on the ground of a donation from the French commander, and instituted proceedings upon this claim, in the admiralty court at Fayal. Sentence was pronounced on the first of April, against his claim, and he appealed. On the 4th of the same month, the assured, having received an account of these accidents, gave notice of abandonment.

The master of the vessel sold what was left of the cargo, and after paying the law expenses, left the remainder of the proceeds to answer the Portuguese captain's appeal. He, by this means, regained possession of his ship on the 11th of May, and sailed, on the next day, for Liverpool, where he arrived before the assured had commenced his suit. It was insisted, in favour of the underwriters, that the recovery of the ship, before the commencement of the action, defeated the abandonment.

Lord Ellenborough said, that in the cases where it had been held that a recovery of the property defeated the abandonment, 'there was a restitution of the ship, in an undamaged state, and she afterwards earned her freight; so that all pretence of a total loss, at the time of bringing the action, had ceased. The mere restitution of the hull, if the assured may eventually pay

more for it than it is worth, is not a circumstance by which the totality of the loss is reducible to an average one. If no abandonment had been already made, do not sufficient circumstances exist, in the present case, to warrant an original abandonment at the present moment? It appears to us that there existed, at the time of the action brought, circumstances fully sufficient to entitle the assured to recover for a total loss.'(1)

(1) *M'Iver v. Henderson*, 4 M. & S. 576.

The English court of common pleas seems to have acquiesced in the doctrine adopted in the King's Bench. Chief Justice Dallas says, 'In case of abandonment, after capture, the abandonment is superseded, if the ship be recaptured, and pursues her voyage beneficially.'(2)

(2) *Hudson v. Harrison*, 3 Brod. & Bing. 105.

Accordingly, the doctrine appears to be very explicitly adopted by the court of King's Bench, and acquiesced in by that of the common pleas in England, that an abandonment, made seasonably, and for a sufficient cause, is defeated, if the loss ceases to be total before action brought. The opinion of the Scotch court was different, and Lord Eldon concurred in that opinion. The doctrine of the King's Bench cannot, therefore, be considered to be completely established as law in Great Britain.

(3) *Peele v. Merch. Ins. Co. C. C. U. S. Mass. Oct. 1822. 2 Mason, 22. See 2 Val. 143. h. t. a. 60; 2 Emer. c. 17. s. 6. p. 194; Code de Com. l. 2. t. 10. s. 3. a. 196. See also Ches. Ins. Co. v. Stark*, 6 Cranch, 268.

In the United States 'an abandonment once rightfully made, is conclusive, and the rights following from it are not divested by any subsequent events, which change the situation of the property.'(3)

During a detention of the ship by capture, the freight was abandoned, and before the action brought upon the policy on freight, the vessel had been released. A majority of the judges of the supreme court of the United States were 'of opinion that the state of loss at the time of abandonment, must fix the rights of the parties.'(4)

(4) *Rhine-lander v. Ins. Co. of Penn.* 4 Cranch, 29.

Mr. Justice Parker, giving the opinion of the court in Massachusetts, upon this question, said, 'Upon abandonment seasonably made or offered, the only question would seem to be, whether a right to abandon existed at the time; and if it did, the relation of the parties to the property is fixed by that act. If this be not true, but the rights of the parties are held to be uncertain and fluctuating, after an abandonment, under circumstances which constitute a total loss, there seems to be no reason why the commencement of the action should be fixed upon as the period when this uncertainty is to cease, rather than the time of rendering the verdict. But how great the inconvenience would be, that the degree of responsibility of the insurer should not be known until the end of a lawsuit, must be obvious to every one who considers the importance of having some legal owner of the property, to prevent its waste and destruction. Some period should be established at which the right of the assured to indemnity, and of the insurer to the property, should be fixed; and we think we are warranted by sound principles to fix the time of abandonment as that period.'(5)

(5) *Lee v. Boardman*, 3 Mass. Rep. 238. See also *Jumel v. Mar. Ins. Co.* 7 Johns. 412.

Where a policy provided that a loss should be paid in sixty days, after proof and adjustment thereof, and the ship, being

(1) *Munson v. N. E. Mar. Ins. Co.* 4 Mass. Rep. 88.

abandoned during a detention by capture, was restored within the sixty days after the abandonment, Chief Justice Parsons said, 'The abandonment was made when the loss was total, and a right to recover for a total loss was vested in the assured; and this right cannot be affected by the credit given to the insurers, in the payment of the loss.'⁽¹⁾

(2) *Dutilgh v. Gatliff*, 4 Cranch, 31. n.; 4 Dall. 446.

(3) *Bordes v. Hallett*, 1 Caines, 444; *Jumel v. Mar. Ins. Co.* 7 Johns. 412

Chief Justice Tilghman, in giving the opinion of the court in Pennsylvania, said, 'Some period must be fixed for determining the right of the parties. To limit it to the time of commencing the action, would be of little service to the insurers; for the law being once so established, an action would be brought in every instance on the first default of payment. The time of abandonment seems to be the most convenient period, because the property is transferred by the abandonment, and can never afterwards be claimed by the assured. There is no reason why the assured should be bound, and the insurer left free to take advantage of the subsequent events.'⁽²⁾ The same doctrine is adopted by other American courts.⁽³⁾

Section 15. Effect as to Rights of Property, Claims, and Liabilities.

It is the effect of a valid abandonment to transfer the property in the subject. The payment of a total loss by the insurers, or their liability to pay such a loss, in consequence of an abandonment, gives them a title to the property, or what remains of it, as far as it was covered by the policy.

An abandonment considered as an assignment, refers to the time of the loss.

An abandonment, considered as an assignment of property, must have reference to the time of the loss, for only that which is constructively lost, can be abandoned, and to know what is lost, reference must necessarily be had to the time of the loss. From that time the insurers are, to most purposes at least, entitled to the advantages, and subject to the liabilities, of ownership. This is not inconsistent with the principle, that the right of abandonment depends upon the state of the existing facts; which means, as we have seen, that the facts of which the assured is informed, and which he makes known to the underwriters as the ground of his abandonment, must constitute a total loss, and also, that the loss must not have ceased to be total in the mean time. The abandonment must be authorized by the existing facts, but as an assignment, it has reference to the time of the loss.

(4) 2 Emer. 223. c. 17. s. 9.

(5) *Davidson v. Case*, 8 Price, 542.

In France an abandonment of the ship, considered as a transfer of the property, has been construed to relate to the commencement of the risk.⁽⁴⁾ But in the English cases, it seems to be taken for granted, that an abandonment of any subject, considered as an assignment, relates to the time of the loss.⁽⁵⁾ It has been distinctly held in Massachusetts, that 'the abandonment relates to the time of the loss, and not to the commencement of the risk. The undertaking, on the part of the insurer upon the ship, is, that he will pay for it, if it should be

lost by the perils in the policy. Until that event happens, the property remains in the assured; and the freight and her earnings belong to him until that time. But after the loss has happened, the insurers, in virtue of the abandonment, become the owners, and are liable for the repairs and expenses, and are entitled to the earnings of the ship.'⁽¹⁾

The same opinion has been given in New York, where it is held that 'an abandonment relates back to the time of the loss, and renders the insurer proprietor from that time.'⁽²⁾ In case of a stipulation on the part of the assured not to abandon on account of capture, until after a detention for six months, the court said, that the abandonment when made, after the expiration of that time, 'related back to the time of the capture.'⁽³⁾

The property thus transferred by an abandonment, is called *the salvage*, and if this, or any part of it, has been received by the assured, or applied to his use, the value of what has been so received or applied, is deducted in adjusting the amount to be recovered in a total loss. It seems to follow, as a necessary consequence, that if the salvage has been lost, or its amount diminished, by an act of the assured, for which the insurer is not answerable, or by any event or circumstance which is not at the risk of the insurer, the amount so lost, or by which the salvage is thus diminished, is to be deducted in adjusting the amount to be recovered for the loss.

The question has already been considered, whether the insurer is at the risk of the loss, or diminution of the salvage on freight or profits, in consequence of the abandonment of the ship or goods.⁽⁴⁾ Whatever doctrine may be adopted in this respect, the principle upon which it is founded, does not seem to authorize a construction by which the insurers of one interest, or any part of the subject, shall be liable for any loss in consequence of another insurance upon a different interest, or upon the same subject, any further than such a loss is a direct and necessary consequence of such other insurance, made in the common form. Estrangin says, that any convention between the owner and freighter, cannot affect the rights of the insurer under an abandonment.⁽⁵⁾ The rights of an underwriter cannot be affected by any contract, made by the assured with another underwriter, or any other person, except as far as the assured is supposed to reserve the right of making such other contract, and the underwriter to subscribe the policy under an implied condition, that the assured may exercise such right.

Upon this principle the amount of salvage, to which one underwriter may be entitled upon an abandonment, ought not to be diminished in consequence of any particular agreement between the assured and other underwriters on the same subject. It has however been held, in one case, that the amount of salvage may be so diminished, and the underwriter must sustain the loss. Seven open policies being made upon goods, an eighth was made, in which the goods were valued above the invoice price. An abandonment being made, the amount insured in the open policies was such, that if the insurers in those policies received

(1) Coolidge v. Gloucester Mar. Ins. Co. 15 Mass. Rep. 346.

(2) Schieffelin v. N. Y. Ins. Co. 9 Johns. 26. See also Leavenworth v. Delafield, 1 Caines, 573.
(3) Clarkson v. Phœn. Ins. Co. 9 Johns. 1.

Salvage received by the assured, or lost by his fault, deducted.

Diminution of salvage in consequence a different valuation in other policies.

(4) Supr. 429. 432.

(5) Poth. h. t. No. 36. n.

salvage, in the proportion of the amount insured by them, to that of the invoices, the remainder of the salvage would not be so great a proportion of the whole salvage, as the amount insured in the eighth policy was, of the sum at which the goods were valued in that policy. That is, the insurers in the seven open policies may have insured, say, seven eighths or the whole of the amount of the invoice prices, and so in consequence of the abandonment, would be entitled to seven eighths or the whole of the salvage. In the eighth policy, a quarter, or sixth part of the sum at which the goods are valued in that policy, may be insured, and consequently the insurer in that policy, would, by an abandonment, be entitled to a quarter or sixth part of the salvage. Now it is evident that the salvage cannot be distributed so as to give them respectively these proportions, and that it cannot be so apportioned, is a consequence of the assured's effecting policies upon the same subject at different values. Yet in a case of this description the court said, that, 'in no case would this consideration create a difficulty as between the parties to a policy. Among the underwriters alone, in the distribution of the thing abandoned, would it be necessary to determine on the correct rule to be applied in such a case.'⁽¹⁾

(1) *Pleasant v. Mar. Ins.*
Co. 8 Cranch,
59.

But it has been, in effect, held otherwise in Massachusetts, in a case where the owner of a ship, at first had insured upon her, in a valued policy, the whole sum at which she was valued; she was then insured in an open policy, and her value was proved to be greater than the sum at which she had been valued in the former policy. An abandonment was made upon the first policy, and subsequently upon the second. But the court said, that as the first abandonment carried the whole property of the vessel, there was nothing left to abandon under the second, and that the assured could only recover for a partial loss.⁽²⁾ The principle of the decision is, that the rights of the underwriters in one policy, cannot be affected by a valuation agreed upon in another policy by the assured.

(2) *Higginson v. Dall*, 12
Mass. R. 96.

The salvage must not be diminished or encumbered, otherwise than in consequence of the peril.

If, in case of abandonment, the salvage has been lost, or is encumbered with liens, or its amount is diminished, otherwise than in consequence of the perils insured against, or by the acts of persons for whose conduct the insurers are answerable, the assured ought either to lose his right of abandonment, or—which seems in most cases to be the more convenient and practical rule—he ought to be charged, in the adjustment of a total loss, with the amount by which the salvage has been diminished. Insurance was made upon a vessel, which had been bottomried previously to the time of her being purchased by the assured, but he had no notice of the bottomry. A constructive total loss occurred, and the assured made an abandonment. The vessel had, however, been seized, and sold to satisfy the bottomry bond. Mr. Justice Thompson, in giving the opinion of the court, said, 'In ordinary cases, immediately on abandonment, the subject would become the property of the underwriter. If, then, the underwriter has been deprived of this property in consequence of an incumbrance for which he is not answerable,

the assured must put him in the same situation he would have been in, had no such lien existed, that is, in the present case, by deducting the value of the vessel, at the time of abandonment, from the amount of the insurance. (1)

(1) *Williams v. Smith*, 2 Caines, 20.

This case supports the doctrine, that the insurers are not liable to suffer by incumbrances not arising out of the risks insured against. But the mode of adjusting the loss adopted in this case admits of some question. The assured effected a policy upon the supposition that he owned the whole of the vessel; but it turned out that he owned only a part of her. His interest was the excess of the value of the ship over the amount due upon the bottomry bond at the commencement of the risk. There appears to be no reason why the loss should not have been adjusted, precisely as if a previous policy had been made, to the amount due upon the bottomry bond, with the usual stipulation as to prior insurance. An adjustment upon this principle would, in most cases, evidently give a result very different from that of applying the rule adopted in the above case.

Where the salvage is encumbered with a lien, arising out of the perils insured against, the insurers must take it, subject to such charge. In case of recapture, or the recovery of property abandoned at sea, or wrecked, the salvors are entitled to a compensation or reward, which is also called *salvage*, and they have a lien upon the property saved, and may keep possession of it until they are paid. (2) Regulations are frequently made fixing the amount of this compensation or salvage at one eighth, fourth, half, &c. of the value saved, (3) or prescribing the mode of proceeding, for settling what shall be allowed in each particular case. (4)

Compensation to salvors.

(2) *Hartford v. Jones*, 1 Lord Raym. 343; 2 Salk. 654.

(3) Leg. Rhod. s. 2. a. 45, 46, 47.

(4) 12 Ann Stat. 2. c. 18. cited Park, 216; Marsh. 548; 26 Geo. II. c. 19. s. 5, 6; 48 Geo. III. c. 130. s. 21.

In ordinary cases of shipwreck, or the abandonment of property at sea, the persons who save any part of the property are entitled, both in England and the United States, to a reasonable compensation and reward, according to the time employed, the danger incurred, and the service rendered. The amount to be allowed to the salvors, in such cases, is, in general, determined by a court of admiralty, which allows one half, or more, or less, of the value saved, according to the circumstances, and the conduct of the salvors. (a)

In case of recapture by a public ship, the law of Great Britain allows one eighth, and by a private armed vessel, one sixth, to the recaptors. (5) The laws of the United States, allow salvage in the same proportion in the case of recapture of property belonging to citizens of the United States: except in case of the recapture of an armed vessel, where one half is allowed; and in case of recapture, before condemnation of a ship, or of goods, belonging to the subjects of a friendly nation, the same compensation is allowed to the recaptors, which would be allowed to recaptors *vice versa*, in the country to which the owners belong,

(5) 43 Geo. III. c. 160.

(a) *Mason v. The Blaireau*, 2 Cranch, 240; *Peisch v. Ware*, 4 Cranch, 347; *The Adventure*, 8 Cranch, 221; *The Brig Alerta*, v. Blas Moran, 9 Cranch, 359.

(1) Stat.
1800. c. 168.
[xiv.] s. 1. 3.

for the recapture of property belonging to citizens of the United States.⁽¹⁾

The claim for salvage, as between citizens of the United States and those of other countries, has, in some instances, been regulated by treaty.^(a)

In all these cases the insurers against capture, are either liable to pay the expenses of salvage, as a partial loss, or upon abandonment, they take the property subject to the charges.

The insurers
are not liable
for wages
earned before
a total loss
takes place.

After the insurers become owners of the ship, in consequence of abandonment, they are, like any other owners, liable for mariners' wages, but they are entitled to the ship, free of any incumbrance or lien for wages, earned before the time to which the abandonment relates, in respect to the ownership of the vessel. A question has occurred, as to the distinction between the claims of the seamen for wages, as such, and their right to compensation for saving the property, in cases of shipwreck, with salvage. The insurers have no concern with the wages earned before the occasion of the abandonment, since the wages were earned under a contract between the sailors and other persons, relating to property in which the insurers had no interest.

(2) Frothing-
ham v. Prince,
3 Mass. Rep.
563.

A vessel insured on a voyage from St. Ubes to Newburyport, was, in the course of the voyage, cast away upon Cape Cod; and the cargo was wholly lost, but a part of the wreck of the ship was saved, to the amount of 879 dollars, after deducting the expenses of salvage. The assured made an abandonment. They 'had been compelled to pay' the wages of the seamen, up to the time of the shipwreck. The amount of wages from St. Ubes, was 560 dollars, and from London, the ship's previous port of departure, 724 dollars. A question was made, whether the assured were entitled to recover either of these sums from the underwriters. It was decided that they were entitled to recover the sum of 664 dollars.⁽²⁾ This was probably the amount of wages from St. Ubes, with the interest for a little more than three years; this being the period between the time of the shipwreck and that of rendering judgment.

(3) Coffin v.
Storer, 5
Mass. Rep.
254.

In this case it is stated, that the proceeds of the materials of the ship saved, that came to the underwriters by the abandonment, were of a certain amount after payment of salvage, and it was decided that the insurers were liable to pay the wages out of that amount, which seems to make the case rest upon the doctrine, that the insurers, in consequence of the abandonment, became liable for wages earned before the accident, and on account of which the abandonment is made. But in a subsequent case, Chief Justice Parsons, by an incidental remark, puts the claim for wages, in such a case, upon the ground of salvage. He says, 'Wages would have been lost by the wreck, had not sufficient been saved to pay them. They are then a charge on the property saved, in the nature of expenses towards the salvage.'⁽³⁾

(a) Convention of 1782, with the Netherlands. Treaty of 1783, with Sweden, art. 17, 18. Treaty of 1799, with Prussia, art. 21.

Mr. Justice Story is of opinion, that this is the only ground upon which the above case can be supported. He says, 'The case of *Frothingham v. Prince*, has been pressed upon the court, as a direct authority, to prove that the payment of wages does not depend upon the earning of freight, if the ship or any of her materials, equal to the wages, remain after the voyage. No reasons are given for this decision. Perhaps it may have turned upon the ground, that, under the circumstances, the seamen were entitled to salvage equal to their wages. If, however, it be incapable of this explanation, as I confess, from an examination of the record, I think it is, the most that can be said, is, that it is a single case, standing alone against the current of authorities.'⁽¹⁾

(1) *The Saratoga*, 2 Gallison, 183.

A case somewhat similar, has come before Mr. Justice Story. A ship sailed from Newport to Gibraltar, and there delivered her cargo, and proceeded thence, in ballast, to Ivica, where she took on board a cargo of salt, with which she sailed for Providence, but was wrecked in the course of the voyage, on Dutch Island in Narraganset Bay. The seamen remained by the wreck three days, doing duty, and saved a principal part of the sails, rigging, cables, and appurtenances of the ship, more than sufficient in value to pay their wages up to the time of the shipwreck. The ship was abandoned to the underwriters, by whose agent the seamen were discharged.

Mr. Justice Story held, 'That the seamen were entitled to their full wages, up to the period of arrival, and during half of the time of the ship's stay at Ivica. But the question remains, whether the seamen can claim wages, as such, for the homeward voyage. It appears to me that upon the established doctrines of our law, where the freight is lost by inevitable accident, the seamen cannot recover wages, as such, from the ship-owner. But I am clear that upon principle, the seamen are entitled to salvage for their labour and services, in preserving the wreck of ship and cargo, or either. Assuming that the crew were not discharged from their contract by the shipwreck, but were still bound to labour for the preservation of ship and cargo, I am of opinion that this does not disable them from claiming as salvors, for extraordinary exertions in cases so perilous. It cannot be, that they are bound to labour when there is no possibility of earning any reward, and if, by the nature of the case, they are excluded from wages, that very circumstance raises a title to compensation by way of salvage.'

The court intimates, that the case of shipwreck ought to be an exception to the rule, that the earning of wages depends upon the earning of freight,—to the extent of the value of the property saved; but concludes that the rule, as legally established, is not subject to this exception. The judge accordingly approves of those cases in which the wages are adopted, 'as a mode of ascertaining and fixing the salvage. The wages recovered in cases of shipwreck, are recovered in the nature of salvage, and as such form a lien on the property saved.'

(1) The Two
Catharines, 2
Mason's Rep.
319.

Abandonment
to several in-
surers, does
not make
them liable as
partners.

(2) Unit. Ins.
Co. v. Scott, 1
Johns. 106.

The insurers
have an equi-
table interest
in claims for
remuneration
for losses paid,
without aban-
donment.

A question was made as to the party by whom this charge was to be borne ; and the court was of opinion, ' that in this case it must be borne by the underwriter on the ship. It is not like the ordinary charge of seamen's wages, which are a charge upon the ship-owner, and are to be borne by the freight ; but it is an expense in saving the materials of the ship, for the benefit of the underwriters on the ship, and as they exclusively receive the benefit, they are to receive it *cum onere*. The case of Frothingham v. Prince is directly in point, and, in my judgment, stands upon the true principles of insurance.' (1) The court no doubt, here considers the allowance to the seamen, in that case, to have been made in the nature of salvage ; since the case would not otherwise be an authority in support of the opinion here given.

Although a valid abandonment gives the underwriters the advantages, and subjects them to the liabilities of ownership of the property, yet it has been held, that an abandonment of the same subject, to different underwriters, does not make them joint owners, and jointly liable as copartners. A ship being abandoned to twenty-three different underwriters, it was held that they were not jointly liable, as copartners, for repairs done upon the ship. (2)

An abandonment is not necessary in order to give the insurers a right to receive the proceeds of claims arising out of losses which they have paid. A mere payment of a loss, whether partial or total, gives the insurers an equitable title to what may be afterwards recovered from other parties on account of the loss. The effect of the payment of a loss, is similar, in this respect, to that of an abandonment. Thus, if the risk of barratry, or any other misconduct of third persons, is insured against, and a loss is paid on this account ; and subsequently the assured recovers the damage from the master or other persons, whose misconduct was the cause of the loss, there can be no doubt that the insurers would be equitably entitled to the damages so recovered, in the proportion in which they had made indemnity for the loss.

The same principle is applicable to cases of capture and arrest. A cargo being insured on a voyage from New York to Leghorn, the vessel was captured, in the course of the voyage, by a French privateer, and carried into Porto Ferrajo. The ship and cargo were decreed to be restored, from which decree the captors appealed. The property was, however, delivered to the consignees, on their giving bonds, to the amount of the appraised value, to answer to the final decree. The property insured, was appraised at a value exceeding that at which it had been insured ; and as it was finally condemned in the council of state, and the condemnation approved by the emperor, the consignees were compelled to pay their bonds. The goods, however, were sold at Leghorn, at a value exceeding the amount at which they had been appraised.

The assured made no abandonment, as he wished to avail himself of the state of the markets at Leghorn, but demanded

from the underwriters, as a partial loss, at least the whole amount at which the property was valued in the policy, if not the whole sum paid, on account of it, upon the bonds given by the consignees. A verdict was given in favour of the assured, 'for the whole sum mentioned in the policy.' The court approved of the verdict, and expressed an opinion that the assured was entitled to recover, as a partial loss, the whole amount paid upon the bond, although it exceeded the whole value at which the cargo was insured. Chief Justice Kent said, 'Nor is the assured, in this case, to be limited to the prime cost of the subject. It is a rule of computation which ceases when the value can be ascertained, as in this case, by a more obvious rule, namely, the sum actually paid.'^(a)

In regard to the rights acquired by the underwriters, by the payment of this loss, Chief Justice Kent, giving the opinion of the court, said, 'Here the loss is equal to a total loss, and the assured must recover the amount of the bond, (at least as far as the subscription covers it,) or nothing at all. To attempt to ascertain the value of the *spes recuperandi*, as it respects the claim on the French government, and to deduct that value from the recovery, appears to me to be useless.'^(*) It would be perfectly arbitrary to undertake to estimate the worth of such a hope. If such a hope does legally exist, so that it can be judicially regarded, the assured ought to renounce it in favour of the insurer, or not recover at all. But there is no existing hope of recovery in this case. The law had pronounced a definitive sentence in the highest tribunal. Any chance of reimbursement under that sentence must be the result of future negotiations between the two governments, and that is a subject totally unfit for the investigation of a jury. No court is competent to act upon such speculations. If France should, at any future period, agree to, and actually make compensation for the capture and condemnation in question, the government of the United States, to which the compensation would in the first instance be payable, would become trustee to the party having the equitable title to reimbursement, and this would clearly be the insurers, if they should pay the amount of the bond.'⁽¹⁾

(*) Vide
Supr. 384.

Claims arising from the payment of a loss upon property captured and condemned.

(1) *Gracie v. New York Ins. Co.* 8 Johns. 183.

In this case the payment of the loss, or the liability to pay it, in consequence of abandonment, gives the insurers an equitable interest in the claims arising from the property. The insurers are considered as purchasing the property, as far as they pay, or are liable to pay, for the loss of it. Upon the same principle, the underwriters on the life of William Pitt were held to be en-

The loss paid by the government. Policy on the life of William Pitt.

(a) The same court adopted a rule, similar in principle, in the case of *Suydam v. Mar. Ins. Co.* 2 Johns. 138. The amount due in a partial loss is, by this rule, made to depend upon the state of the markets; the underwriter receives a premium according to the invoice value, or the valuation, but pays losses in reference to some other value. This leads to the inconsistency of paying more than the property is worth for saving it; since, as between the parties, it is worth the amount at which it is insured. Vide Supr. 380, 381.

(1) *Godshall v. Boldero*, 9 East, 81. See also *Blaauwpot v. Da Costa*, 1 Eden, 130.

titled to what was paid by the government, after his death, to the assured, in discharge of the debt due to him from Mr. Pitt, which constituted his insurable interest. Although a total loss had taken place under the policy, by the death of Mr. Pitt, yet, as the government subsequently paid the debt on account of which the insurance was made, it was held that nothing could be recovered from the insurers.⁽¹⁾ Under the policy the insurers were liable to pay the debt, as guarantors or obligors in an agreement of indemnity; and they were, therefore, entitled to have the benefit, directly or indirectly, of what was paid by the debtor himself, or by others on his account.

(2) *Randal v. Cockran*, 1 Ves. 98.

Freight earned instead of that insured.

Some British ships having been captured by the Spaniards, the British government ordered reprisals, by making capture of Spanish ships; and distributed the proceeds of the property so captured, among those who had lost their property by Spanish capture. The insurers, who had paid for losses by Spanish captures, claimed the proceeds of the ships and cargoes taken by way of reprisal. Lord Hardwicke said, 'The person originally sustaining the loss was the owner; but, after satisfaction made to him, the insurer. No doubt, but from that time, as to the goods themselves, if restored in *specie*, or compensation made for them, the assured stood as trustee for the insurer in proportion to what he paid.'⁽²⁾

(3) *Green v. Roy. Ex. Ass. Co.* 1 Marsh. Rep. 447. S. C. 6 Taunt. 68.

Upon the same principle the insurers on freight are entitled to the benefit of other freight earned instead of that which is insured. Chief Justice Gibbs, speaking of a loss of the freight insured, in consequence of a loss of the cargo, said, 'If the ship had brought home another cargo, that would have been a salvage on the original freight; for though, when the cargo was taken on board, the insurance was on that specific cargo; yet, if the ship, having been driven back to her original port of lading, had taken another full cargo on board at a lower freight, the assured would have been entitled to have recovered the difference.'⁽³⁾

(4) *Puller v. Staniforth*, 11 East, 232.

(5) *Bell v. Puller*, 12 East, 497. n. See 12 East, 494. an attempt to show these two cases to be consistent.

A case arising upon a charterparty has been decided upon the same principle. The charterer agreed to pay dead freight, if the Russian government should not permit the vessel to load. This was equivalent to an insurance against that risk. The Russian government did not permit the vessel to load, but the captain procured a cargo at Stockholm. It was decided that the charterer should pay the freight stipulated in the charterparty, after deducting that earned from Stockholm.⁽⁴⁾ But a different decision was given in another case, the court saying that the earning other freight was the owner's affair, with which the charterer had nothing to do.⁽⁵⁾ But the two cases only differ in respect to considering the stipulation to be in the nature of an insurance; since, if it be considered to be of this character, there can be no doubt of the correctness of the first decision.

Whether by an abandonment the in-

It has been incidentally implied, in some instances, that the insurers have an option in respect to accepting of the salvage; but this question does not seem to have been very particularly

considered. It is a question of some importance on account of the liabilities they may be under, as owners of the salvage, on account of freight and other charges. An abandonment of goods, where the insurers thereby become owners of the salvage, makes them liable for the freight, pending at the time, which may be finally earned. If the insurers take the goods at all, they take them subject to this incumbrance.⁽¹⁾

surers unavoidably become owners, and are subjected to the consequent liabilities.

(1) *Union Ins. Co. v. Russell, Anthon's cases at N. P. 128.*

But cases sometimes occur in which the goods are not worth the freight. This gives occasion to the question, whether an abandonment of the goods, not accepted, makes the insurers liable to pay the freight. But this question arises only in case of deterioration of value in consequence of the perils insured against; for it cannot be supposed that by an abandonment of goods insured against arrest and detention only, the value of which is reduced below the amount of freight by sea-damage, the insurers can be made liable, not only to pay a total loss to the assured, but also the amount of freight to the owners of the vessel. The loss by freight, in this case, arises from a peril not insured against. The assured ought not only to pay the freight, but also to account to the insurers for the value of the goods, in a sound state, supposing the damage to have happened before the arrest or detention. Until the total loss by arrest or detention at least, he is the insurer against sea-damage, and he ought to be accountable as such. But if the sea-damage happen after the constructive total loss by arrest or detention, the liability of the insurers to bear the consequent loss of freight, depends upon the question, whether they are unavoidably, and independently of their consent, made owners of the property, and subjected to the consequent liabilities, by an abandonment.

From the authorities already cited as to the liability of the insurers for loss by freight, consequent upon damage by the perils insured against,⁽²⁾ the better opinion seems to be, that this is not among the effects of the usual perils for which they are liable. If this doctrine is adopted, it follows that the insurers may pay a total loss, but refuse to accept of the salvage, and thus avoid the charge in question. But upon the same principle on which the assured is required to elect immediately whether to abandon, the insurer ought to be required to signify immediately that he refuses the salvage on this ground, since the condition of the parties would not be reciprocal, if the insurers might lie by, and in the event accept of the salvage if it should prove to be of any value, but throw it upon the hands of the assured, in case of the charges exceeding the value.

(2) *Supr. 377.*

The case which has gone the greatest length against the insurers in this respect, only makes them liable to lose the benefit of the salvage. Corn insured without any exception of average loss, was so much damaged that it was sold for 67*l.*, the freight due upon it being 80*l.* A question was made before Lord Hardwicke, whether the assured should recover for the whole value at which the corn was insured, or be charged with the 67*l.* in deduction from that value. It was proved to be the

(1) *Boydell v. Brown*, 2 Br. 1065.

where the salvage exceeded the freight, to deduct the freight out of the salvage and make up the loss upon the difference. Lord Hardwicke, C. J. was of opinion, that within the terms of the policy, the assured was entitled to recover the whole value of the cargo as insured, without any deduction on account of salvage.⁽¹⁾ But the effect of an abandonment is to convert the cargo into the property of the insurer, and the consequent liabilities, did not arise until abandonment in this case.

Section 16. Effect as to Conduct of Agents.

(2) *Lee v. Boardman*, 3 Mass. Rep. 247.
(3) *Gardner v. Smith*, 1 Johns. Cas. 141.

The master or whoever has charge of the property, says Mr. Justice Parker, becomes instantly, upon abandonment, the agent of the insurer.⁽²⁾ And the court in New York say, 'The disposition of the goods saved, as made by the consignee, while he acted *bona fide*, ought to be at the risk and for the benefit of the insurer.'⁽³⁾

(4) *Jumel v. Mar. Ins. Co.*, 7 Johns. 423, & 424.

A ship being captured and condemned, was abandoned on the first of June. On the third of the same month the captain repurchased the vessel. In an action on the policy for a total loss, Kent, C. J. said, 'The master, in consequence of the abandonment, became the agent of the insurers. The purchase of the vessel by the captain, was for the benefit of the insurer, if he chose to take it. Whatever might have been the merit or demerit of his conduct, is immaterial in the present case. The loss continued total to the time of the abandonment. If the captain had been afterwards wanting in the faithful discharge of his trust, he would have been answerable to the insurers.'⁽⁴⁾

The captain's conduct as to making an appeal is held to be at the risk of the insurers.

It being provided in a policy upon the cargo, that, 'in case of loss or misfortune, it should be lawful and necessary for the assured, or his factors and servants, to labour, &c. The property was captured by a British privateer, and carried into Nevis, where the cargo was condemned, on the 25th of November, 1807, as enemy property. An abandonment was made on the 11th of January, 1808. The insurers objected that the master ought to have appealed from the sentence of the vice-admiralty court. Yates, J. 'I can discover no reason why the insertion of the word *necessary* should essentially alter the construction of the above clause. It imposes no additional duties upon the master. He was before bound to labour diligently for the recovery of the property, yet this does not affect the right of abandonment. By abandoning, the assured yields up all his interest in the subject, and the captain, from that time, becomes the agent of the insurers. The captain, consequently, is answerable to the insurers for his default, if any exists.'⁽⁵⁾

(5) *Gardner v. Col. Ins. Co.*, 7 Johns. 514.

(6) *Mitchell v. Edie*, 1 T. R. 608.

The same doctrine prevails in England, where a valid abandonment is held to transfer the risk of the solvency of agents, to the insurers.⁽⁶⁾ And Chief Justice Dallas says, 'If the loss happens in this country, and notice of abandonment is duly

given, from that moment it becomes the duty of the underwriter to send down an agent.'⁽¹⁾

Where a cargo was insured, with an agreement 'not to abandon, if captured, until six months after notice,' the vessel was captured by a French privateer, on the 31st of March, and carried into Calais. Intelligence of the capture was received in New York, on the 26th of May, and on the same day notice was given to the underwriters. On the 26th of July, the master, at Calais, made a compromise with the captors, whereby he agreed to relinquish both ship and cargo to them, on receiving 64,000 francs, being about one quarter of the value. On the 26th of November, it being six months after notice, the assured abandoned. The court said, 'The capture created the total loss, and the special stipulation in the policy only suspended for six months the general right to abandon. The abandonment related back to the capture, and took its operation and effect from that loss. The only question is, whether the act of the captain in the intermediate time destroyed or impaired the assured's right. The captain, acting with good faith, and upon the best advice that could be obtained, entered into a composition with the captors. The parties to the policy neither authorized, nor have since adopted, the act of the captain; but as he was *ex necessitate*, the mutual agent of both parties during that time, to do what was right, his acts, done in good faith, and for the benefit of all concerned, could not prejudice the rights of either under the contract.'⁽²⁾

After capture and abandonment of a cargo, an agent appointed by the assured to prosecute a claim for the proceeds of the goods at Matanzas, recovered and received two thirds of the proceeds, deducting expenses. A question was made as to the party for whom he should be considered the agent. The court said, 'The composition made by the agent was made in good faith. It was made for the benefit of the insurer, to whom the person entrusted with the management of the business must be considered the agent. It was a discretion within the scope of his authority. The money is still in the hands of the foreign agent. He may fail, and the assured ought not to run that risk.'⁽³⁾

A cargo insured was captured by a French privateer, and carried into Malaga, and there condemned as lawful prize, by the French consular court. On receiving intelligence of the capture, the assured, at New York, abandoned, and the underwriters paid a total loss. While proceedings against the cargo were pending in the consular court at Malaga, the cargo, being damaged by sea-water, was sold, as it was liable to deterioration, if kept on board. A mercantile house at Malaga, bought the cargo, at the request of the captain, for the benefit, and on account of the assured, 'and whomever else it might concern,' considering themselves as acting in the capacity of agents of the assured, to whom they would have had recourse for payment of any loss on the purchase. But the cargo sold for nearly twice the amount given for it by the Malaga house; accordingly, that house held about fourteen or fifteen thousand dollars,

Compromise made by the captain before the abandonment.

(1) *Hudson v. Harrison*, 3 Brod. & Bing. 106.

(2) *Clarkson v. Phoen. Ins. Co.* 9 Johns. 1.

(3) *Miller v. De Peyster*, 2 Caines, 301.

The cargo being captured, and purchased by the agents of the assured under a provisional sale, pending proceedings, is subsequently condemned; an abandonment is made, and a total loss paid; the insurers are entitled to the benefit

of the purchase.

as agents, which belonged either to the assured, or the underwriters. This amount of property was shipped to the assured, by whom it was received in New York, and the question was, whether they could retain it, or were liable to pay it over to the underwriters.

Chief Justice Kent, giving the opinion of a majority of the court, said, 'The assured abandon, and the underwriters accept and pay. They were then substituted for the assured, and succeeded to the benefit of the acts of the agents abroad. The merchants at Malaga acted nominally as agents for the assured, but, in reality, they were agents for the party having the ultimate claim to the property.'

'There is no ground for considering the purchase as made for the assured, in the character of strangers to the property; it was made for them as having an interest in it, and with intent to mitigate the loss. The law of abandonment applies to such a case, with the greatest justice and good policy, in making the previous instructions, and all acts of the agent, enure to the insurer.'

(*) Ord.
Louis XIV. b.
t. a. 66, 67;
Code de Com.
l. 2. t. 10. s.
3. a. 206; 2
Val. 59, 60;
1 Emer. 464.
c. 12. s. 21.

'The insurer was not bound, unless he pleased, to accept of the purchase at Malaga; nor was the assured. The agent purchased at his peril. There can be no risk, therefore, that this doctrine will involve insurers in hazardous mercantile concerns.'(*)

(†) 2 Burr.
699.

'If, after capture or condemnation, the owner recovers, or takes his captured ship, the insurer can be in no other condition than if she had been recovered or taken before condemnation.(†) He must bear the loss actually sustained, and can be liable for no more. After condemnation, the property is changed, so that a complete title can be transferred from the captor to a third person, but this doctrine does not apply between the assured and insurer, so as to authorize the assured to be the purchaser; if he is, and still claims a total loss from the insurer, he must tender him the benefit of the purchase. This rule is essential to prevent fraud.'(†)

Mr. Justice Thompson gave no opinion, and Mr. Justice Livingston dissented from that of the other judges. Speaking of the condemnation of the cargo at Malaga, he said, 'The moment sentence is pronounced, the right of the captors to sell, is complete, and to such a sale all the world are, or may be, parties. The insurer may buy if he pleases, so may the original proprietor, or any stranger. He who does so, does it at his own peril; as the owner, if he purchase, cannot throw the loss

(†) The Chief Justice does not mean that the rights and liabilities of the parties will depend upon any tender of the benefit of the purchase, according to the rule in the French Code, Liv. 2. t. 10. s. 3. a. 207. He says, in a subsequent case, that we have no such rule. *Gracie v. N. York Ins. Co.* 8 Johns. 183. He can only mean that the insurers are entitled to the benefit of the purchase, if they pay a total loss. A neglect on the part of the assured to make any tender or offer, can have no effect, unless it be construed to be a revocation of the abandonment.

upon the underwriter, so neither can the latter come in for the profits.'

The court, however, decided that the insurers were entitled to the benefit of the purchase.(1)

A vessel having been captured was abandoned in due time, and afterwards restored; when the master, a Spaniard, who had been appointed by the assured, and was ostensible owner, went off with the vessel, and gave no account of it. Mr. Justice Putnam, in giving the opinion of the court, said, 'If the ostensible owner became the agent of the underwriter after the restoration, the underwriter would be answerable for a total loss; but the ostensible owner was not the agent of the insurer, but of the assured. The loss occurred by reason of his fraud. The assured has sustained a loss, not from any of the perils in the policy, but from the act and fraud of one for whom the underwriter is not answerable.'(2)

The expressions in which this opinion is given, seem to be at variance with the preceding cases, in which an abandonment is considered as having the effect of making the captain, or other person having charge of the property, the agent of the underwriters, and it is not intimated that the assured remains answerable and guarantor to the insurers for the conduct of such agent; but in some of the cases it is, on the contrary, expressly said, that the insurers are at the risk of his misconduct. The circumstance that the captain was ostensible owner, and that the assured had agreed 'to claim the property as Spanish, until acquittal or condemnation,' may perhaps distinguish the last, from the preceding cases. The court, however, says, 'The abandonment was undoubtedly made for sufficient cause; which involves the grounds of the decision in some uncertainty.

It is said, in the cases upon this subject, that, in consequence of an abandonment, the captain or consignee, who has charge of the property, becomes the agent of the insurers from the time of the abandonment. This implies very distinctly, that his conduct, whether prudent or imprudent, honest or fraudulent, is at their risk. If it were not so, the captain or consignee ought to be considered the subrogated agent of the assured. Upon this construction the abandonment makes the assured the agent of the insurers, and the assured has substituted another person, namely, the captain or consignee in this agency, for whose conduct he is answerable until such substitute is recognised by the insurers as their immediate agent. This makes the case the same as that of the appointment of a sub-agent by the agent, in ordinary cases, in which the employment of sub-agents is authorized.

The doctrine, that the assured himself is the only authorized agent of the insurers, in virtue merely of the abandonment, may have been adopted in the case last cited; and there are very strong reasons in favour of this doctrine. The assured appoints the agent, gives him instructions, and conducts the correspondence with him. He is in fault, if the agent has been injudiciously chosen, and he is generally the best informed, as well

The captain and ostensible owner goes off with a vessel that had been abandoned on account of capture.

(1) Unit. Ins. Co. v. Robinson, 2 Caines, 280; S. C. in error. 1 Johns. 592.

(2) Smith v. Touro, 14 Mass. Rep. 112.

after, as before the abandonment, of the proceedings of the captain or consignee, and is in a situation to exercise the most effectual control over his conduct.

Lord Mansfield and other judges, say, in numerous instances, that the conduct of the captain is at the risk of the insurers, while he acts *bond fide*, and according to the best of his judgment. This cannot be strictly correct, since in other instances it is said, that the mistakes of the captain before abandonment, at least, are at the risk of the assured. But then, again, it cannot be laid down as a general doctrine, that the mistakes of the captain, of whatever kind, are at the risk of the assured. Thus, when the captain runs the ship ashore in consequence of mistaking a light, which had been erected after the ship sailed, and for which mistake he was not to blame, it was not intimated, and the insurers did not think of taking the ground, that the assured must for this reason bear the loss.⁽¹⁾ Many other cases have occurred of the same import. It accordingly appears that the insurers are not always answerable for consequences, although the captain acts *bond fide*, but that the assured, in some instances, are answerable for his mistakes, and, in others, the insurers.

(1) *Peele v. Merch. Ins. Co.* 2 Mason's Rep. 22.

The meaning of the judges, in these instances, must be taken in reference to the circumstances of which they were speaking, and subject to a distinction before suggested,⁽²⁾ that before abandonment at least, if the captain or other agent uses his discretion within the limits of his authority, and acts *bond fide*, the insurers are liable for losses occasioned by the perils insured against, although some error of judgment in the captain or other agent, may have contributed indirectly to such losses. The same rule as to the agent's exceeding his authority, applies to the conduct of the captain, after an abandonment. Where he applied the proceeds of the cargo in repairing the ship, and also in equipping her as an armed vessel, without any orders so to do, it was held that the underwriters, to whom the ship had been abandoned, were liable to the shippers, only for the proceeds of the goods expended in necessary repairs, since this was the only part of the expenditure incurred within the authority with which the captain was invested.⁽³⁾ In regard to third persons, the rules concerning the liability of the captain's principals, for his acts as an agent, are the same respecting his conduct after, as before, an abandonment; and are the same which are generally applicable to the conduct of agents.

(2) *Supr.* 192. 408.

(3) *Unit. Ins. Co. v. Scott*, 1 Johns. 106.

We have seen also, that if the captain or other agent, by his misconduct, or his mistake in overstepping the limits of his authority, makes a loss total, which, by the necessary and inevitable consequences of the perils insured against, was only partial, the insurers are not thus made liable for a total loss.⁽⁴⁾ The decision above cited,⁽⁵⁾ unless it be supposed to proceed upon the agreement 'to claim for the property as Spanish,' extends the same principles to the conduct of the captain after a valid abandonment; and makes the assured the immediate agent of the insurers, and the captain or consignee the sub-agent of the assured, whom he is authorized to employ, for the consequences of whose conduct

(4) *Supr.* 407. 408.

(5) *Smith v. Touro*, 14 Mass. Rep. 112.

the insurers are answerable while such sub-agent acts with good faith and within his authority, but for whose acts done fraudulently and without authority, whereby the salvage is diminished, the assured is answerable to the underwriters, until they recognise the captain or consignee as their immediate agent. And there are certainly very strong reasons in favour of this doctrine.

Section 17. Effect of the Abandonment of the Ship as to Freight.

The effect of the abandonment of the ship, as to the title to the freight, has been much discussed in France. Valin(1) says, the net freight earned subsequently to the commencement of the risk, goes to the underwriter to make up for the diminution of the value of the ship in the mean time. Emerigon is of the same opinion.(2) And upon the same principle he thinks that an abandonment, in case of shipwreck, gives the insurers the benefit, not only of the net freight that may become due, of that which is pending at the time of the accident, but also of the net freight earned in consequence of delivering goods at the port of their destination, previously to the time of the shipwreck.(3) Estrangin is inclined to the same opinion, but he thinks that the code of commerce(4) has settled the question, by providing that 'the freight of merchandise saved, where it has been paid in advance, shall make a part of the subject of an abandonment of the ship, and shall belong to the insurers, saving the rights of lenders on bottomry, seamen's wages, and the expenses during the voyage.' He is of opinion, that this article virtually excepts from the abandonment, the freight earned previously to the accident, by the delivery of goods according to the bills of lading.(5)

(1) Tom. 2.
p. 115. des
assur. a. 47.

(2) Tom. 2.
p. 221. c. 17.
s. 9.

(3) Tom. 2.
p. 222. c. 17.
s. 9.

(4) L. 2. t.
10. s. 3. a.
197.

(5) Poth. par.
Estrangin,
No. 26. n.

According to the French law, therefore, an abandonment gives the underwriters on the ship, the benefit of only the freight pending at the time of the loss. As freight is not an insurable interest in France,(a) the rules there, respecting the effect of an abandonment of the ship upon the freight, are different from those adopted in Great Britain and the United States. In case of shipwreck, without the loss of the cargo, where the whole, or a *pro rata*, freight becomes due in consequence of the consignee's accepting the goods at an intermediate port, such freight will, by the French law, go to the insurers to whom the ship is abandoned. Whereas, in England and the United States, it is always taken for granted, that an abandonment of the ship does not include such freight.

(a) At the time of compiling the new code, the question of permitting the insurance of freight and profits, was very much discussed; the former prohibitions were however continued.

Freight earned before the loss, does not go to the underwriters upon the ship.

(1) *Luke v. Lyde*, 2 Burr, 882. See remark of Le Blanc, J. 4 East, 44.

A ship, upon a voyage from Newfoundland to Lisbon, was captured, whereby the voyage was broken up, though the ship was recaptured and brought to England. The ship was abandoned to the underwriters, but a freight *pro ratâ* being due for the part of the voyage performed before the capture, this freight was considered to be due to the owners, and no question was made as to its belonging to the underwriters to whom the ship had been abandoned.(1)

If the captain, after his own ship is lost or disabled, procures another to carry on the cargo, it is not any where intimated that the insurers will be entitled to any benefit accruing from the earning of freight in this case.

But it has been a question much considered in England and the United States, whether an abandonment of the ship includes the pending freight, towards the earning of which something was done before the loss, but the earning of which is completed, after the accident abandoned for, by the same ship, on her being repaired or released from detention. One mode of considering this question is by a comparison with other transfers of the ship.

Mortgagee not entitled to freight, until he has possession of the ship.

In case of a mortgage of a ship, Lord Mansfield and the other judges were of opinion, that, 'till the mortgagee takes possession, the mortgagor is owner to all the world; he bears the expenses and is to reap the profits;' and accordingly, that the freight earned, or which becomes due after the ship is mortgaged, but before the mortgagee is in actual possession of the ship, does not belong to the mortgagee.(2)

The ship and charterparty assigned to different persons.

(2) *Chinnery v. Blackburne*, 1 H. Bl. 117. n.

The owner of a ship, having on the 17th of August entered into a charterparty to carry a quantity of tar from Stockholm to Plymouth, subsequently, on the 26th of August, and before the ship sailed on the voyage, executed a regular bill of assignment of the ship to Henry, the master, and about five months after the ship had sailed, he assigned the bill of lading to one of his creditors, Hamilton, as security for a debt. The vessel having performed the voyage, the question arose, whether the freight was equitably due to Henry, to whom the ship had been assigned, or to Hamilton, to whom the charterparty had been assigned. Heath, J. 'Hamilton could not be in a better situation than the original owner was at the time of assigning the charterparty, and he could not, after the assignment of the ship, prevent Henry from receiving the debt.' Lawrence, J. 'The right to the freight, subsequently accruing, must belong to the assignee of the ship as incident thereto.'(3)

(3) *Morrison v. Parsons*, 2 Taunt. 407.

A transfer of the ship is held not to include the pending freight.

While a ship was on a voyage from Portsmouth to Port Mahon, the owner transferred her on the 14th of September, and she arrived at Port Mahon on the 24th of October following. The owner became bankrupt, and a question arose, whether the freight due at Port Mahon belonged to the person to whom the vessel was transferred, or to the assignees under the bankruptcy of the original owner. Lord Ellenborough, C. J. 'We cannot say that the covenant [of charterparty] is transferred to the assignees of the ship, by the assignment of the property in the ship, in the same manner as certain covenants are said to run

with land.' And the freight was accordingly held to belong to the assignees under the bankruptcy.(1)

(1) *Splidt v. Bowles*, 10 East, 279.

The preceding cases relate to the assignment of the ship in the usual modes, and arguments have been drawn from such assignments, to the case of transfer by abandonment. The effect of an abandonment upon the pending freight, was very elaborately discussed in the cases arising in England out of the Russian embargo of 1800, and thence called the *Russian embargo cases*.

In case of detention by that embargo, from November, 1800, until the following May, the assured abandoned both ship and freight to the different sets of underwriters on each. A total loss was adjusted on the policy upon the ship, on the 19th of January, 1801, payable in one month, as usual; and a total loss was adjusted on the freight on the 11th of February, payable in one month; with an agreement on the part of the assured, 'on payment, to assign all his right of recovery,' &c. of freight, to certain persons named, for the benefit of the insurers, as far as the policy covered the freight. The total loss was paid by the underwriters according to the adjustment. The embargo being taken off in May, the vessel brought home her cargo, and earned freight for the voyage insured. The assured had made no assignment of the ship or freight, otherwise than by an abandonment of each. The freight was received by him, and was claimed by both sets of underwriters.

Russian embargo cases.

It was decided in this case, that the assured should pay over to the underwriters on the freight, the gross freight, as salvage, without deducting any of the expenses of navigating the ship and earning the freight. The court considered the insurers to be entitled to the whole freight, on the ground of the agreement made by the assured to assign it. But they said, if the rights of the two sets of underwriters clashed in this case, they should have considered the underwriters on the ship as entitled to the freight.(2)

(2) *Thompson v. Rowcroft*, 4 East, 34.

In case of detention by the same embargo, the ship and freight were abandoned to the respective sets of underwriters, who paid a total loss. After the adjustment of the loss on each interest, the embargo was taken off, and the vessel proceeded on the voyage insured, with her original cargo; and the assured, as agents of the underwriters on the ship, paid the expenses of the voyage and received the freight. *Alvanley, C. J.* 'We have inquired into the circumstances of the case(*) lately decided in the King's Bench, upon the same subject, and find they do not materially differ from the present. Here the assured agreed to assign over all their right and interest in the policy upon the ship, after which they agreed to assign over to the underwriters on freight, all their future interest to arise on the freight. The ship having returned and earned freight, the assured received the whole; and the question now is, whether the underwriters on freight are not entitled to demand what the assured have received.' In compliance with the opinion of the King's Bench, it was held that the assured was liable to pay over to the under-

(*) *Thompson v. Rowcroft*, ut Supr.

(1) *Leatham v. Terry*, 3 B. & P. 479.

Russian embargo cases.

writers on freight, the amount of freight earned. But the Chief Justice said, 'Though the case has been argued as if it were a question between the two sets of underwriters, we desire to be understood as not giving an opinion upon such a case.'⁽¹⁾

In case of detention by the same embargo, the ship and freight were severally abandoned to the respective underwriters upon each, at the same time, on the 11th of January, 1801. The ship had gone out from England under a charterparty, to bring back a cargo of masts, &c. to England, and the cargo had been taken on board at Riga, when the embargo was laid. The embargo being taken off, the ship was released on the 30th of May, and subsequently brought a cargo to England, in pursuance of the original charterparty. The insurers on the ship had paid a total loss in February, when the assured assigned to two persons, in behalf of the underwriters on the ship, all their 'interest, property, claim, and demand, of, in, to, or out of, the ship and her appurtenances.' The agent of the underwriters on the ship had advanced money for the expenses of repairs done upon the ship at Riga, and to pay the seamen's wages and other expenses, on the arrival of the ship in England. He had also received the freight, and a question was submitted to the court, whether he had a right to retain it; or was liable to pay it over to the assured, in whose names the action was brought to recover the freight, but on behalf of the underwriters on the freight, as far as it had been insured and abandoned.

Lord Ellenborough, C. J. 'The question in this case seems to resolve itself into a single point: viz. whether the freight has been lost, or not? If the freight, in the events which have happened, has not been lost, no loss can be demandable against the underwriters on freight. If it has been lost, it has become so, not by means of the perils insured against, but by means of the abandonment of the ship; which abandonment was *the act of the assured themselves*, with which the underwriters on freight have no concern.' The decision accordingly did not settle the point which had been most laboured in the argument, namely, the effect of the abandonment of the ship upon the pending freight. But the judges intimated, in the course of the argument, that the abandonment of the ship included the pending freight.⁽²⁾

(2) *M'Arthy v. Abel*, 5 East, 388.

(3) *Ker v. Osborne* 9 East, 378.

Another similar case was brought before the same court; but it turned upon a collateral point, and the main question which the parties had in view—the effect of the abandonment of the ship upon the pending freight—remained undecided.⁽³⁾

Another ship detained by that embargo, was a general *seeking*, and not a chartered ship, which having taken on board a greater part of her cargo at Cronstadt, and when the rest was coming down from St. Petersburg in lighters, was seized and detained on the 15th of November, 1800. The ship had been insured for the outward and homeward voyage, and the freight for the homeward voyage. An abandonment was made in February to both sets of underwriters, who paid a total loss of the ship and freight, as far as the interests were covered by the policies.

The embargo being taken off in May, the captain reloaded a larger part of the cargo which had been on board in November, but taken out and ware-housed during the winter; and he remained at Cronstadt until the third day of July to complete his cargo; when the ship sailed, and she afterwards arrived safe at Liverpool, and earned freight. The captain had given bills of lading to the several shippers in November, but in the spring he gave new bills of lading for that part of the cargo which had been shipped in the autumn, and was again taken on board in February.

Russian embargo cases

Lord Ellenborough said, 'He felt great difficulty in saying, after an abandonment of the ship, the owner could abandon freight, which seemed to follow the property in the ship, and the earnings made by the subsequent use of that which then become the property of others. If it had been a chartered ship he should have known better how to deal with the difficulty; but in the case of a *seeking* ship, as this was, he did not well know how to separate the character of owner of ship from that of freight, where the freight was to be earned on each parcel of the goods shipped and brought home.' But the judges gave no deliberate opinion upon this point, which was made a part of the case presented to the court.⁽¹⁾

(1) *Sharp v. Gladstone*, 7 East, 24.

Thus after all these cases, in which the question of the effect of the abandonment of the ship, in respect to freight, was elaborately and repeatedly argued, the question remained undecided. But a judgment has since been given upon it, both in the court of King's Bench and that of the Exchequer Chamber. In a case of capture in the course of a voyage from Rio Janeiro to Liverpool, the ship and freight were abandoned to the respective underwriters on each, and the abandonment of each was accepted, and a total loss was adjusted and paid on the ship, and subsequently a total loss was also adjusted and paid upon the freight. The ship and cargo were recaptured and brought into London, and were restored to the owners, with the payment of salvage. The freight was earned by the delivery of the cargo at the port of destination, and was received by the assured for the use of the parties—whether underwriters on the ship or the freight—who should establish their claim to it.

In England the abandonment of the ship is held to include the pending freight.

The court of King's Bench were of opinion, that the abandonment of the ship transferred to the underwriters on the ship, the whole freight pending at the time of capture, and subsequently earned. Mr. Justice Bayley, however, dissented. He thought that the abandonment of freight transferred to the insurer of that interest the right of receiving the freight.⁽²⁾

(2) *Case v. Davidson*, 5 M. & S. 79.

The same case was brought before the court of Exchequer Chamber, where Chief Justice Dallas, giving the opinion of the court, said, 'It is not denied that, generally speaking, an assignment of the ship includes freight, but it is said that it does so because such is the natural effect of such assignment, where there is no agreement between the parties to the contrary; whereas, in cases of abandonment, such agreement is to be imputed from the practice of making separate insurances, which

the law permits ; and that the law will therefore keep the interests of the parties separate, giving the freight to the underwriter on freight abandoned.'

'That such a practice has prevailed is true, but there is a fallacy in confounding the fact of that practice with the legal effect of a contract of insurance. Such a practice, if of sufficient prevalence and notoriety to raise a presumption of general knowledge, would show the understanding of the parties, with reference to which they must be taken to deal, and therefore would form the basis of a contract between those who were respectively privy to it. But it was admitted that there had been no such settled practice ; the underwriters on the ship having, in every instance, resisted the claim of the underwriters on freight, asserting that the freight belonged to themselves, as owners of the ship, on the abandonment being made.'

'There being then no actual or implied agreement between the two sets of underwriters, what is the legal operation of their respective contracts ? In resolving this question, I put no stress upon the fact, that freight passes under a general assignment of the ship ; because that appears to me to be begging the question—the question arising on the distinction, existing in cases of abandonment, as being different from common transfer by the ordinary modes.'

'The case seems to me to result to this: in every other case of transfer the freight follows the assignment of the ship ; and if abandonment be but a different name for assignment, and the same in effect, unless modified to a different purpose, by the agreement of parties ; and if in this case, so far from there being any such agreement, the contrary is to be implied, the reason fails for taking the case out of the general law. Consequently the underwriters on the ship, under an abandonment, are entitled to the freight.'

(1) Davidson v. Case, 8 Price, 542 ; 8. C. 2 Brod. & Bing. 379.

In New York abandonment of the ship carries a rateable part of the pending freight.

A ship and the freight were insured with different sets of underwriters, from Bangor in Wales, to New York. The ship being compelled, by stress of weather and sea-damage, to put into Rivadeo in Spain, was abandoned to the underwriters upon her, who accepted the abandonment, and paid a total loss. The ship, being repaired, afterwards performed the voyage, and earned freight. The freight was insured after the owner heard of the vessel's putting into Rivadeo. The question was made, whether the insurers, to whom the ship had been abandoned, were entitled to the whole, or any part of the freight.

Mr. Justice Radcliff said, 'I think the insurer on the ship can in no event gain by means of the freight. The effect of an abandonment is to substitute the insurer in the place of the assured. It bears no analogy to a sale. I can discover nothing to support the insurer's right to recover what he did not insure. By accepting the abandonment, the insurers became owners of the ship, but they could only take her *cum onere*, subject to the situation in which she was placed, and the engagements of the voyage they had insured, and to the rights of all parties concerned in the adventure. The ship may belong to one per-

son, the freight to another, and the cargo to a third. Suppose in that case the assured on the ship to abandon, could the underwriters by any construction be entitled to the freight which originally was, and continued to be, the property of another?

Mr. Justice Kent said, 'Abandonment, if accepted, is equivalent to an absolute sale of the property. The insurer must consequently become entitled to the freight subsequently earned, for freight is incident to the ownership of the vessel, and follows it as closely as rent does the reversion. All the subsequent charges must be borne by the insurer, and as he takes the burden, he ought to reap the advantage. And upon principles equally strong, the insurer must be entitled to the freight earning or accruing at the time of the abandonment, in like manner as if a person sell land, after the crop is sown, or assign the reversion before the rent becomes payable, the emblements in one case, and the rent in the other, will pass with the land.'

'If any portion of the freight had already become due, the same would undoubtedly remain with the assured, and not be affected by the abandonment. But the growing freight must pass with the ship, for want of a precise and definite rule of apportionment. The case of a voyage, partly performed, is not susceptible of an accurate adjustment of a rateable freight. It is very questionable whether the owner can preserve his claim against the insurer on freight, if he abandon the ship.'

Mr. Justice Benson was also of opinion that the right to the whole pending freight passed to the insurers by abandonment.

Lewis, J. 'My opinion is, that the freight ought to be apportioned, and that the insurers should recover so much as was earned subsequently to the peril that caused the abandonment.' Lansing, C. J. was also of this opinion.(1)

(1) *Unit. Ins. Co. v. Lenox*, 1 Johns. Cas. 377; S. C. 3 Caines, 251.

The same case was brought before the court of errors, a majority of whom were of opinion, with Chief Justice Lansing, and Mr. Justice Lewis, that the freight should be apportioned.(2)

(2) S. C. 2 Johns. Cas. 443.

Accordingly, in a subsequent case of abandonment of ship and freight to the respective sets of underwriters, on account of the capture of the ship after she had performed eight ninths of the voyage insured, the court said, 'According to the decision in *The United Insurance Company v. Lenox*, the underwriters on the freight are entitled, in virtue of the abandonment, to all the vessel's earnings, previous to her abandonment, that is to say, eight ninths; and those on the ship, to the remaining ninth.'(3)

(3) *Leavenworth v. Delafield*, 1 Caines, 578.

Chief Justice Kent says, 'It was determined in the *United Insurance Company v. Lenox*, that upon abandonment of the vessel, the owner of freight being also owner of the ship, did not thereby abandon the freight *in toto*, but retained a certain part to be apportioned *pro rata itineris*, and therefore to be carried down to the time when the loss happened.'(4)

(4) *Davy v. Hallett*, 3 Caines, 20.

In a subsequent case, it is said by the same judge, 'Whether the abandonment of the ship deprives the insurer on freight of his salvage, I need not say, though the better opinion is, that it does.' He adds, that it is a question between the respective insu-

(1) Living-
ston v. Col.
Ins. Co. 3
Johns. 49.

(2) Mar. Ins.
Co. v. Unit.
Ins. Co. 9
Johns. 190.
See Peters v.
Phoen. Ins.
Co. 3 Serg. &
Rawle, 28;
Simonds v.
Union Ins. Co.
Whart. Dig.
337. h. t. 187.

In Massachu-
setts the *pro*
ratâ freight,
subsequent to
the abandon-
ment, goes to
the insurers.

(3) Coolidge
v. Gloucester
Mar. Ins. Co.
15 Mass. Rep.
341.

riers of ship and freight. 'It would be an anomaly in the law, if, when both ship and freight are insured, you cannot abandon the one subject without defeating your right on the other policy.'⁽¹⁾

In a suit between the two sets of underwriters to determine their respective interests in the freight pending at the time of the abandonment of both subjects, the court said, 'The rule by which the freight is to be apportioned, appears to be settled with us by the case of *The United Insurance Company v. Lenox*. The principle contained in the final decision of that case, is, that the freight, prior to the loss, goes to the ship-owner, or to his representative, the insurer on freight, to whom it was abandoned; and that the freight earned subsequent to the time of the loss, goes, on abandonment, to the underwriter on the ship.'⁽²⁾

In a case of constructive total loss by sea-damage, which compelled the ship, on a voyage from Holland to the United States, to put into England, where she was repaired, and afterwards performed the voyage and earned freight, the ship having in the mean time been abandoned, Mr. Justice Putnam, giving the opinion of the court in Massachusetts, said, that as the property in the ship remained in the assured until the time of the loss, 'the freight or her earnings belong to him till that time, if he stands his own insurer for the freight; otherwise to the insurer on the freight.' The subsequent freight was considered to belong to the insurers, to whom the ship had been abandoned since, 'the ship, repaired at an expense exceeding half her value, must, to all legal purposes, be considered a new ship, as much as if the insurers had procured a new keel, and wrought up iron and timbers into a vessel of a different kind and form.'⁽³⁾

All the preceding cases establish the doctrine—which seems to be in itself almost too obvious to need any elaborate reasoning in support of it—that the earnings of the ship belong to the owner. No difficulty occurs in applying this doctrine, except in the case of a freight pending at the time of a total loss, and earned partly before, and partly after, the happening of the loss. An application of the doctrine to this case, evidently requires an apportionment of the freight *pro ratâ*, between the owners before the total loss, and the insurers, who are the owners after the loss has taken place. The only objection made to this application of the doctrine, is the supposed difficulty of making it; but this objection does not seem to be of great weight, since nothing is more usual than an allowance of *pro ratâ* freight in other cases, and the difficulty of apportioning freight is not greater than that of adjusting a general or particular average in ordinary cases. Admitting the apportionment to be practicable, of which there can be no doubt, the reasons in favour of making it are quite obvious. There seems to be no reason why the underwriter, to whom the ship is abandoned, should be entitled to the advantages accruing from what she had previously done towards earning freight. The assured must abandon the ship free of incumbrance, and the insurer is not entitled to the benefit of a pending charterparty, or what has been done towards earning freight under it. The insurer is not entitled, in conse-

quence of the abandonment, to an assignment of the charterparty from the assured. If the assured tranships the goods, and completes the earning of freight, by another ship, the insurer to whom the original ship is abandoned, has no right to object. The terms of the charterparty may prevent this, but as the charterparty is a contract between other parties, the underwriters are not entitled to the benefit of its stipulations. Suppose the goods to be delivered before the freight is paid, it does not appear how the underwriters can recover the whole freight. They cannot recover it under the charterparty, to which they are strangers; and they cannot recover it for services rendered by the use of their ship in transporting the goods, since the goods have been transported in their ship for a part, only, of the voyage. Allowing the underwriters to be freed from any legal embarrassment in recovering the freight directly from the shippers, it does not appear upon what ground they could recover more than the price of transporting the goods subsequently to the constructive total loss. Admitting that the underwriters have a lien on the cargo for the entire freight—which lien they cannot have as owners of the ship, in consequence of the abandonment, but they have it, if at all, as representing, and being substituted for, the assured, as a party to the charterparty—still this affords no reason why they should retain the whole freight, merely because they have the means of enforcing the payment of it. There seems to be no satisfactory reason for allowing the whole freight to the underwriters, unless that alleged by the French writers is to be admitted, who consider the freight earned, or what has been done towards the earning of freight, to be a compensation for the diminution of the value of the ship by wear and tear, and consumption of provisions; which principle is not applicable in England or the United States, where freight is a distinct insurable interest; and where, in case of shipwreck, and the saving of the cargo, and an allowance of freight *pro rata*, for the delivery of the cargo to the consignee at an intermediate port, it has never been suggested or imagined, that the underwriters, to whom the ship is abandoned, are entitled to such freight. This is an exclusion of the principle, that the underwriters are entitled to the freight, as a compensation for the diminution of the value of the ship.

Section 18. Amount Recoverable.

The assured can recover for a total loss, as such, only the value at which the subject is insured. But besides this amount, the insurers may also be liable for a partial loss on account of repairs actually made, and they may also be liable for expenditures in addition to a total loss.

Lord Ellenborough said, 'There may be cases in which, though a prior damage be followed by a total loss, the assured may, nevertheless, have claims, in respect of that prior loss, which may not be extinguished by the subsequent total loss.'

- (1) *Livie v. Janson*, 12 East, 655.
 (2) *Le Cheminant v. Pearson*, and *Le Cheminant v. Allnutt*, 4 Taunt. 367.
 (3) *Lawrence v. Van Horne*, 1 Caines, 284. See *Bordes v. Hallett*, 1 Caines, 444.

Disbursements for repairs made prior to the happening of a total loss, are of this description; unless they are more properly covered by that authority with which the assured is invested, of suing, labouring, &c. for the defence, safeguard, and recovery of the property. (1) Chief Justice Mansfield said he had known cases in the King's Bench, where 'such expenses had been recovered, without any distinction, whether as an average loss, or within the permission to sue, labour,' &c. (2)

In case of capture, expenses were incurred in prosecuting an appeal. Mr. Justice Radcliff, said, 'I am informed that it was decided by this court in 1795, that the insurer is liable for similar expenses, beyond the amount of his subscription; and I believe that the underwriters have, in practice, uniformly acknowledged their liability.' (3)

In case of insurance upon a ship captured and condemned under the Milan decree, very considerable charges were made by the captain for services and expenses 'about the business of the ship only,' as the captain said; but as a great part of these expenses were incurred while the cargo remained on board, the court said, 'That the charges arose before the captain ceased to have charge of the cargo, and were therefore incurred in labouring for the benefit of the cargo, as well as for the ship and freight. And it would seem just, that the cargo should bear its proportion of the expenses, until the captain ceased to have any concern with it; and that the ship and freight should bear the expenses in due proportion throughout. But the labour and expense were incurred for the recovery of the ship, notwithstanding that other subjects might enjoy the result. The assured was obliged to pay the charges, as owner of the ship, and he is entitled to recover the whole in the first instance of the insurer on the ship, and to leave it to him to call upon the owners or insurers of the cargo and freight.'

'There is no doubt that the insurer is liable beyond the sum insured, for the expenses of labour and travel for, in, and about the safeguard and recovery of the property insured. The clause ought to be confined to expenditures arising directly from a prosecution of the direct objects for which it was introduced.' Accordingly, where the assured on the ship had agreed to make the captain the *extra* allowance of 'one dollar per day for each day he remained in port,' for discharging the cargo, procuring freight, and attending to the interests of the owner, it was held that this charge could not be recovered against the underwriters in addition to a total loss, on account of the captain's remaining, after a capture, to look after the property. The court said, the assured might have allowed the captain twenty dollars per day, but the underwriters ought not, as a matter of course, to be answerable for this charge, in addition to a total loss. (4)

- (4) *Watson v. Mar. Ins. Co.*, 7 Johns. 57.

- (5) *Jumel v. Mar. Ins. Co.*, 7 Johns. 424.

The same court said, subsequently, 'According to the settled construction of the general permission given in the policy, to labour, &c. the insurer is liable to expenses incurred in attempting to recover captured property, in addition to the payment of a total loss.' (5)

A ship being abandoned on account of detention by an embargo, the court said, as 'the insurers would not accept of the abandonment, and the assured might have sold the ship; if, instead of selling her, or laying her up and discharging the crew, he thought proper to continue the crew in service, and under wages, he cannot make the expense a charge under a policy upon the ship. In addition to a total loss, the insurer is answerable only for the necessary expenses incurred in labouring for the safety and recovery of the subject insured.'⁽¹⁾

(1) *M'Bride v. Mar. Ins. Co.* 7 Johns. 433.

In case of insurance upon the cargo, the ship put into the port of Copenhagen to refit, and after refitting, was detained by an embargo, on account of which the cargo was abandoned. The cargo was held to be liable to contribute in general average, for the expense of the unloading and storage of the cargo, and the wages and provisions of the crew; and the court said, 'These are expenses which the insurer is to pay, in addition to a total loss.'⁽²⁾

(2) *Barker v. Phoen. Ins. Co.* 8 Johns. 245.

In case of loss upon freight, it was held that the assured was not bound, by a custom, to strike off one third for wages, provisions, and other charges, unless he knew of the existence and uniformity of the custom;⁽³⁾ that is, in a total loss of freight the insurers are liable for the gross amount.⁽⁴⁾ In case of total loss the underwriters are always liable for the amount of the insurable interest, and the gross freight is considered to be the amount of this interest.⁽⁵⁾

(3) *M'Gregor v. Ins. Co. of Penn. Whart. Dig.* 388. h. t. n. 188.
(4) *Stevens v. Col. Ins. Co.* 3 Caines, 43.
(5) *Supr.* 324.

CHAPTER XVIII.

EXCEPTED LOSSES—THE MEMORANDUM.

POLICIES of the usual form, upon the cargo, contain an exception of certain losses. The exceptions relate to the amount of the losses, and also to the kind of articles insured, and were formerly in all policies, and still are in many, introduced in a note or memorandum, and hence the kinds of goods to which these exceptions relate, are called *memorandum articles*, and the subject of these exceptions, as a part of the law of insurance, often passes under the name of *the memorandum*.

In the English policies, certain articles are 'free from average, unless general, or the ship be stranded;' and certain others, 'free from average under 5 per cent; and all other goods, the ship, and freight, under 3 per cent, unless general, or the ship be stranded.' All general averages are to be paid by the underwriters, in the same manner as if the policy did not contain this memorandum; but they are not liable to pay any partial loss under the rates specified, unless the vessel be stranded;

that is, if the vessel be stranded, they become liable to pay all particular averages to which such stranding is construed to relate.

The stranding of the vessel defeats, to a greater or less extent, the exception. This gives rise to the questions—what is stranding? and to what extent does it defeat the exception?

What is
stranding.

(1) 7 T. R.
208.

(2) Baring v.
Henkle,
Marsh. 240.

(3) Dobson v.
Bolton, Park,
177.

(4) M'Dou-
gle v. Royal
Ex. Ass. Co.
4 M. & S. 503;
1 Starkie,
130; 4 Camp.
283.

How far
stranding de-
feats the ex-
ception.

(5) Thompson
v. Whitmore,
3 Taunt. 227.
(6) Bowring
v. Elmslie, 7
T. R. 212. n.

(7) Burnett
v. Kensington,
7 T. R. 210;
1 Esp. 416.

In one case the jury found that '*stranding* meant where the vessel took the ground and bilged, so as to be incapable of proceeding on her voyage;' (1) in another, where the vessel was driven aground in the Thames, and remained aground an hour, it was considered not to be a *stranding* within the memorandum. (2) Where the vessel run upon piles, and rested until they were cut away, it was considered to be a *stranding*. (3) But in case of a vessel's touching upon a rock, and resting only a minute and a half, it was held not to be a *stranding*. (4) Where the vessel, being fastened by a rope to the pier of the dock, took the ground, it was considered to be a *stranding* within the meaning of the policy. (5) And Lord Kenyon was of opinion, that a voluntary stranding of the vessel *bonâ fide*, was a *stranding* within the meaning of the memorandum. (6)

Upon the question, whether the stranding defeats the exception in regard only to losses occasioned thereby, or to other losses as well as those, the English reports supply some elaborate cases. (a) By some of the earlier of these cases, it seems that stranding will defeat the exception, only in regard to the losses occasioned thereby, or, at least, to those only which cannot be distinctly traced to some other cause. But, in a subsequent case, the judges were of opinion that the provision in relation to stranding, was in the nature of a condition, on the happening of which, the whole memorandum was defeated, and the underwriters thereby became liable for losses on the memorandum articles, in the same manner as for losses on any others. (7)

It is not distinctly decided, that, if a vessel be stranded in one part of the voyage, and in a subsequent part of the voyage, without any connexion whatever with the stranding, a loss takes place on the memorandum articles, the insurer is liable for such loss; but the opinion of the judges seems to be, that in such case the insurers are liable. The doctrine adopted, appears to be, that after a stranding, the construction of the policy is the same in regard to all losses, as if it did not contain the memorandum.

(8) 7 T. R.
210; Stev. on
Av. P. 4. art.
1. p. 208.

But the decisions upon this point are of the less importance, since the two English insurance companies, a long time ago, struck the provision, in relation to stranding, out of their policies; (8) and in the United States, the forms of policies in common use in New York, and the ports to the south of that place, contain no provision on the subject of stranding. By the common forms of policies used in Boston, and many of the other ports to the north of New York, the insurers are liable for par-

(a) Wilson v. Smith, 3 Burr. 1550; Cantillon v. Lond. Ass. Co. 3 Burr. 1553; Nesbitt v. Lushington, 4 T. R. 783.

ticular average on the memorandum articles, in case of stranding; but the policy expressly limits their liability to the losses occasioned by the stranding. The policies of private underwriters in London retain this provision in its old form.

In Great Britain and the United States the insurers are, in the common form of the policy, generally, and I believe without exception, liable for general averages of however small amount.^(a)

Policies of the common form contain no exception of general average.

Policies generally contain a provision, in the form of a memorandum or otherwise, that the underwriters are not to be liable for any particular average, whether on ship or freight, or any article of merchandise, other than those enumerated in the memorandum, unless it amounts to a certain rate per cent. By the English policies, this exception is fixed at three per cent.^(b) in the American policies it is fixed at five per cent.

Exception of all particular average under five per cent.

The forms of policies in common use, whether in the United States, in England, or on the continent of Europe, contain an enumeration of articles on which the underwriters are not liable for particular average. But there is very considerable diversity in these enumerations. In a form of policy at present used by an insurance company of Paris, this exception extends to salt, fruits, unwashed wool, glass-ware, porcelain, and all articles subject to breakage or rust. In English policies the same exception extends to corn, fish, salt, fruit, flour, and seed; and in some policies to hides, and tobacco.

Exception of average.

In the common forms of policies used in Boston, this exception extends to salt, fish, fruit, grain,^(c) hemp, hides, and skins; and in some forms formerly used, the article of *flax* was added to this list.

Average excepted—in Boston.

This exception is applied to a more numerous list of articles in New York. The common policies of that place exempt the insurers from particular average on salt, dry fish, fruits, whether preserved or otherwise, grain, hempen yarn, hides and skins, bar and sheet iron, iron wire, tin plates, tobacco, Indian meal, cheese, vegetables and roots, cotton bagging, pleasure carriages, household furniture, musical instruments, and looking glasses.

Average excepted—in New York.

The articles usually insured free of average in Philadelphia, are, salt, dried fish stowed in bulk, wheat, Indian corn, and grain of any kind, malt and bread stowed in bulk, and leaf tobacco; or, in some policies, tobacco in casks.

Average excepted—in Philadelphia.

There appears to have been a greater diversity in the forms of policies used in Baltimore, than in those of either of the other places above-mentioned, in respect to the exception of average. In the different forms of policies used there, the articles

Average excepted—in Baltimore.

(a) By the form of the policy at present used by the Royal Insurance Company at Paris, the insurers are not liable to pay general averages that do not exceed three per cent.

(b) The Paris policy above-mentioned contains the same exception.

(c) The meaning of *grain* in the American policies is equivalent to that of *corn* in the English.

insured free of average are, salt, dried fish, or, in some policies, dried fish stowed in bulk, fruit, peas, seed, Indian corn, and, in most cases, Indian meal; wheat, and all kinds of grain, with the exception of rice in some policies; hides, with the addition of pelts in some policies, and of skins and furs in others; malt, bread, cocoa, and coffee stowed in bulk; tobacco, or, in some policies, tobacco in casks; and liquids, or liquids in casks, but this kind of articles is omitted in some policies.

Average excepted—in Charleston and Savannah.

In a form of policy used at Charleston, the articles within this exception are salt, dry fish, fruits, grains of all kinds, Indian meal, flour, coffee in bulk, cheese, bacon, vegetables, and roots; and in one used at Savannah they are the same, with the omission of flour, and addition of cotton bagging and oznaburbs.

All these policies, both English and American, exempt the insurers from particular average on all other articles perishable, or, as it is expressed in some policies, esteemed perishable, in their nature.

Exception of average under a certain rate on particular articles.

Besides the entire exclusion of partial loss on certain articles, the insurers are generally exempted from partial losses under a certain rate per cent on other articles. In the London policies insurance is made free of average under five per cent on sugar, skins, hemp, and flax; and in some policies, rum; and tobacco, and hides, in policies in which these articles are not free of average. The policies made at Lloyd's differ in this respect, as well as in respect of stranding, from those of the insurance companies. In Boston the insurers are not liable for a partial loss under seven per cent on sugar, flaxseed, bread, tobacco, and rice. In New York they are not liable for partial loss under twenty per cent upon hemp; or, under ten per cent upon coffee or pepper in bags or in bulk; or under seven per cent upon sugar, flaxseed, or bread. In Baltimore they are exempted from partial losses under ten per cent upon coffee in bags, and, in some policies, a similar exception is extended to cocoa in bags. In the policy of one of the insurance companies of Charleston, particular average under seven per cent, is excepted on sugar, coffee, cocoa, hemp, flax, flaxseed, bread, skins, hides, and tobacco; and under ten per cent on the following articles, in bags, namely, coffee, cocoa, pimento, and all other East and West India articles. The Philadelphia policies do not contain any exception of particular averages under a certain rate, besides the general exception of those under five per cent.

This account of the exceptions of losses in the common forms of policies, does not probably include all the forms of the memorandum, used by each public insurance company, or in each insurance broker's office, in the places mentioned; nor is it important that it should include them all; since, although it should be minutely accurate in respect of the policies now in use, it might soon cease to be so in respect of those to come into use hereafter. It cannot be a safe practical guide in effecting insurance, nor is it intended or needed as such; it is given, for

the purpose of showing what kind of articles are, in general, considered to be perishable in their nature, or very liable to average from usual and ordinary accidents. The directing of the attention of the assured to the kinds of articles enumerated in the memorandum, may be useful, since persons may perhaps in some instances inadvertently effect insurance upon articles free of average, without considering that such a policy, except during a war when there is great risk of capture, affords but a very imperfect indemnity, and one that is hardly worth stipulating for; as the risk of what is construed to be a total loss, under this exception, is very small.

Under the exception of all partial losses, it has been held in England that malt,(1) peas, and beans, come within the description of *corn*;(2) but that *rice* does not;(3) and that saltpetre is not included in the term *salt*;(4) In New York it has been held that the exception of all partial losses on *roots*, does not discharge the insurers from a partial loss on *sarsaparilla*, though a root; it not being considered a perishable article, to which the reason of the exception makes it applicable;(5) but it had been before held that *deer-skins*, were comprehended under the exception of *skins*, although it was urged that they did not come within the reason of the exception.(6) It was held by the same court that the specification of one species of an article, excluded the other species of the same article, from the exception of 'articles perishable in their own nature;' *dry* fish being specified as an article, free of particular average, excluded other kinds, as *pickled* fish, from the exception.(7)

The exception of particular average excludes a constructive total loss on account of damage to the article. Accordingly, the right of abandonment, on account of damage exceeding half of the value, does not apply to those articles. As long as they continue to be of any value, the underwriters are not liable for a total loss; and from most of the cases it seems, that although they are so damaged, as to be rendered absolutely of no value, still if they remain in *specie*, if they so subsist that they may still be properly designated by the same name, the underwriters are not liable for a total loss.

Where peas were so much damaged, that on arrival they were not worth more than about one quarter of the amount of the freight, it was held not to be a total loss, and it was stated by witnesses to be the general understanding among insurers, that if the goods, on arrival, were found to be of no value, it was still a particular average, and so the insurers were not liable.(8)

Lord Mansfield was of the same opinion, in regard to a cargo of fish which was absolutely spoiled, which yet arrived, and still existed in *specie*, so that it might be properly called *fish*.(a)

Lord Kenyon said it had been uniformly held, that in order to render the insurers liable under this exception, on account of

What articles are comprehended in the memorandum.

(1) *Moody v. Surridge*, 2 Esp. 633.

(2) *Mason v. Skurray*, Marsh. 226.

(3) *Scott v. Bourdillon*, 2 N. R. 213.

(4) *Journu v. Bourdieu*, Park, 113; Marsh. 224. n.

The exception of average applies to damage to the article.

(5) *Coit v. Col. Ins. Co.* 7 Johns. 385.

(6) *Bakewell v. Unit. Ins. Co.* 2 Johns. Cas. 246.

Peas damaged, and not worth more than a quarter of freight.

(7) *Barker v. Ludlow*, 2 Johns. Cas. 289.

Fish spoiled,

(8) *Mason v. Skurray*, Marsh. 226; Park, 191.

(a) *Cocking v. Fraser*, Marsh. 227; Park, 181. The rule seems to be the same in France. Poth. des Cont. Mar. n. 59, Cushing's Translation; Emer. tom. 2. p. 184.

the degree of damage merely, 'the cargo must be wholly and entirely destroyed.'⁽¹⁾

Corn spoiled
by sea-da-
mage.

- (1) *M'Andrews v. Vaughan*, Park, 114; Marsh. 232.
(2) *Neilson v. Col. Ins. Co.* 3 Caines, 108.
(3) *Saltus v. Ocean Ins. Co.* 14 Johns. 138.

In New York the jury were told, in regard to a loss upon corn that was so much damaged as to have become putrid, that if it was so damaged by the perils insured against as to be 'of no value as nutriment for man,' the insurers were liable for a total loss; but this opinion was overruled by the court, who decided that 'so long as the corn physically existed, there could not be a total loss' on account of the damage merely; although it was 'good for nothing; the insurers were not liable.'⁽²⁾

In a case of a vessel's putting into an intermediate port, where a part of the corn was found to be putrid in consequence of sea-damage, and the remainder was not worth carrying on; it was held to be only an average.⁽³⁾

In case of insurance upon wheat from Waterford to Liverpool, the vessel, in going down the river from Waterford, struck upon a rock which occasioned her to fill, and she was run aground to prevent her sinking. The hull of the ship was entirely under water at high water. The wheat was taken out at different times, and in the course of about four weeks it was landed, and two thirds of it was kiln-dried at Waterford. Some part of the remainder was sold for a mere trifle, and the rest was thrown away as of no value. Lord Ellenborough intimated that the assured might have abandoned while the cargo was under water, and before any part of it had been recovered and kiln-dried.⁽⁴⁾ Subsequently the same judge said, 'In this case the assured might have abandoned while the corn remained under water; but they laboured to get it up and preserve it; and when they afterwards did abandon, upon finding it did not answer to them, it was too late.' But the destruction of a part of a cargo of flax by shipwreck was held to be a total loss of such part.⁽⁵⁾

- (4) *Anderson v. Roy. Ex. Ass. Co.* 7 East, 38.

- (5) *Davy v. Milford*, 15 East, 559.

Sugar mostly
washed out of
the hogs-
heads.

- (*) *Davy v. Milford*, ut Supr.
(6) *Hedberg v. Pearson*, 1 Holt, 349; 2 Marsh. 432; 7 Taunt. 154. See also *Glennie v. Lond. Ass. Co.* 2 M. & S. 371.

Insurance being made upon fifty-four hogsheads of sugar, from Gothenburg to Stralsund, free of average, the cargo was so much damaged by sea-water, that the small quantities remaining in the several hogsheads, did not amount to more than one hogshead. Gibbs, C. J. 'I am inclined to think it an average loss. If any of the hogsheads had been entirely lost, it would have been a total loss as to them.' Speaking of the case of a total destruction of a part of a cargo of flax insured under this exception,^(*) the Chief Justice said, the subject was there capable of division; but 'here every hogshead contained some portion of sugar; and I cannot distinguish between a small part and a large part being saved.' A special jury were decidedly of opinion that it was an average.⁽⁶⁾

Mr. Justice Story, in giving the opinion of the court, in one case, said, 'Nothing short of a total extinction, either physical or in value, of memorandum articles, will entitle the assured to turn the case into a total loss, where the voyage is capable of being performed. And perhaps, even as to an extinction in value, where the commodity specifically remains, it might yet be deemed not quite settled, whether, under like circumstances, it would authorize an abandonment for a total loss.'⁽⁷⁾

- (7) *Marcadier v. Ches. Ins. Co.* 8 Cranch, 39.

In regard to the change in a thing by which it no longer remains *in specie*, it was held in New York that a chariot, insured free of average, did not specifically remain, after the loss of the box; for if the box should be replaced, Mr. Justice Benson said, 'It could not, with propriety, be said that the chariot was repaired; it would be a new chariot.'⁽¹⁾

The article so damaged as no longer to remain in specie.

(1) *Judah v. Randal*, 2 Caines' Cas. 324.

It appears accordingly, that where the insurers are exempted from particular average on any article, a partial is not distinguished from a total loss, in consequence of sea-damage to the article, by the same rule as in the case of insurance against both descriptions of loss. Nor is it of any importance whether the exception relates to particular articles, such as usually come under the memorandum; for the construction is the same if the policy be against *total loss only*, or, instead of specifying particular articles, it is agreed, in general, that the insurance is made free from particular average. Whether the exception be general or apply to particular articles, it is requisite, in order to constitute a total loss by damage to the articles, that they should be destroyed in value at least, if not *in specie*.

But it does not appear that there is any difference in the mode of distinguishing a partial, from a total loss of the goods by shipwreck, or by damage to the ship, whether the goods are insured with or without the exception of particular average. On the contrary it has been often assumed, and in many cases decided, that a loss of the ship, and the impossibility of obtaining another, constitutes a total loss of goods insured free of particular average, in the same manner as if they had been insured without this exception. Lord Mansfield, in stating the grounds of the opinion of the court, in favour of a total loss of goods insured subject to this exception, said, 'The ship has an irreparable hurt within the policy, and there is no ship to be had to take the cargo on board.'⁽²⁾

Total loss by shipwreck is determined in the same way on memorandum articles as on others.

(2) *Manning v. Newnham*, Marsh. 585; Park, 260.

Lord Alvanley, speaking of articles free of average, said, 'The underwriter agrees that all commodities shall arrive at the port of destination.' The case was accordingly held to be one of total loss of fruit which had become rotten, and was thrown overboard at an intermediate port, where it was necessary to repair the ship, which could not be repaired without discharging the cargo, and this could be done only by throwing it overboard, as the government of the place would not permit it to be landed.⁽³⁾ The decision was mostly put upon the ground of the necessity of repairs, which shows that a loss of the voyage by damage to the ship, is a total loss of the memorandum articles.

(3) *Dyson v. Rowcroft*, 3 B. & P. 474.

Lord Ellenborough said, in regard to this exception, 'A total loss of the cargo may be effected by a total and permanent incapacity of the ship to perform the voyage; that is a destruction of the contemplated adventure.'⁽⁴⁾

(4) *Anderson v. Wallis*, 2 M. & S. 240.

Rice being insured 'free from particular average,' the vessel was wrecked at the port of destination, but before the rice was discharged. The rice was, however, landed, though much damaged. The same judge said, 'This is not a case of

(1) *Glennie v. Lond. Ass. Co.* 2 M. & S. 371.

(2) *Wilson v. Roy. Ex. Ass. Co.* 2 Camp. 626.

(3) *Thompson v. Roy. Ex. Ass. Co.* 16 East, 214.

(4) *Morean v. U. S. Ins. Co.* 1 Wheat. 219.

A total loss from other cause than damage to the articles, is the same on memorandum articles and others.

(5) 6 Mass. R. 119. and see *Amory v. Jones*, 6 Mass. R. 318.

What circumstances constitute a breaking up of the voyage in respect to articles insured against total loss only.

(6) *Le Roy v. Gouverneur*, 1 Johns. Cas. 226; *Magrath v. Church*, 1 Caines' Cas. 196.

total loss of the goods on account of non-arrival of the ship; (1) thereby intimating, that if the rice had been prevented from arriving, by reason of damage to the ship from the enumerated perils, it would have been a total loss.

In another case, Lord Ellenborough instructed the jury, that the shipwreck of the vessel did not constitute a total loss on *wheat*, where another vessel could have been obtained. (2)

In case of insurance upon sugar and tobacco, free from average, on a voyage from Heligoland to London, the vessel was wrecked at Heligoland after the risk had commenced. The goods were however saved, but in a very damaged state. Lord Ellenborough said, 'If this can be converted into a total loss by an abandonment, the clause excepting underwriters from particular average, may as well be struck out of the policy. We can only look at the time when the goods were landed, and then it was not a total loss, however unprofitable they might afterwards be.' Bayley J. 'The very object of the exception is to free the underwriters from liability for damaged goods. They say, in effect, that they will be liable if the goods are wholly lost, but not if they are only damaged.' (3) It is not said in this case that any other ship could have been procured to carry on the cargo; but the case proceeds upon the supposition, no doubt, that another vessel might have been procured, or that the cargo was too much damaged to be reshipped, although it remained *in specie*, and accordingly that the means of sending it on by another vessel were of no importance.

Mr. Justice Washington, in giving the opinion of the court upon this subject, said, 'If the question turns upon the totality of the loss, unconnected with the deterioration of the cargo in value, or reduction in quantity, there is no difference in memorandum, and other articles.' (4) And the court was accordingly of opinion, that where the vessel was wrecked at the port of destination, but a part of the *corn* was saved and landed, it was an average loss. The same principle has been expressed in Massachusetts by Chief Justice Parsons, who said, speaking in reference to capture and arrest, 'A cargo of *fish* may as well be abandoned by a loss of the voyage, as a cargo of any other description;' (5) and the same doctrine is adopted in New York. (6)

The question respecting a total loss of articles insured against total loss only, has been particularly considered in Massachusetts. Insurance was made upon one half of a vessel, her cargo and freight, 'against total loss only,' on a voyage from Grenada to Wiscasset. A 1000 dollars was insured upon the vessel, which was valued in the policy at 4000 dollars, and the sum of 500 dollars was insured upon the cargo, and the same sum upon the freight. The vessel went ashore at Bermudas, and was so damaged as not to be worth repairing. The repairs would have cost 1500 dollars, and the master had not funds to that amount. He accordingly sold the vessel and cargo, the net proceeds of which, after deducting the salvage and other expenses, amounted to about 400 dollars. Mr. Justice Sewall, giving the opinion of the court, said, 'An insurance *against total*

loss only, is equivalent to an insurance, with the exception of average. If we yield to the authority of *Manning v. Newnham*,^(*) an interruption, by a peril insured against, and by unavoidable consequences, when the voyage is entirely and inevitably defeated and lost, is a total loss within the meaning of the policy, with the same effect, as the absolute destruction of the thing insured.

(*) Marsh.
589; Park,
260.

‘It is difficult to conceive of any peril provided against by the ordinary forms of insurance, which does not admit the supposition of some salvage, remotely possible at least; as in the case of a ship foundered or burnt at sea, every possible chance of salvage is by no means excluded. But in the technical sense of *total loss*, and to every beneficial purpose, in which a contract of insurance can be employed, a ship foundered or burnt at sea, or wrecked and broken upon the land, so as to be past relief or repair, is specifically, and as a vessel, totally destroyed. Such an event is a total loss, for which the underwriter is liable, notwithstanding a very considerable salvage, and notwithstanding any restriction the policy may contain, as being against a total loss only, or as containing an exception against average loss.’

‘The case of a loss of the voyage, when the subject remains, as in *Manning v. Newnham*, it is perhaps more difficult to admit within the same principle of construction. But upon the principle adopted in that decision, the voyage is to be inevitably and entirely defeated; and the total loss does not depend upon the dereliction of the voyage by the assured, either as not worth pursuing, or as being without funds, or any other circumstance depending upon the will or management of the assured or his agent, or upon any election he can exercise by an abandonment or otherwise, for the purpose of rendering a loss constructively total.’

‘In examining the case at bar, the question will be, whether the vessel was specifically destroyed, or the voyage insured was inevitably defeated. The vessel, although injured in her hull, by stranding, was relieved and carried into a port where repairs were practicable, and to be obtained at less than half the amount of her estimated value. The cargo was saved entire, and with very little damage, except the expenses of salvage. And it does not appear, if the vessel had been irreparable, that another carrier for the cargo might not have been obtained. Under these circumstances the agent of the assured proceeded to strip the vessel, and to sell the hull and cargo. The only circumstance urged as rendering this course necessary, was the want of funds to pay for salvage and repairs, at a port within a moderate distance from the owner’s residence; the voyage [to which port] is performed in fifteen days, and not unfrequently in a shorter time.’

‘If the vessel was afloat, or if it was practicable to put her afloat, it was not a total loss within the meaning of the policy. Whether the injury sustained, and the expenses of salvage, rendered the voyage of no value and not worth pursuing, is not a

Whether the destruction of a part of the article is a total loss of such part, under the exception.

(1) *Murray v. Hatch*, 6 Mass. Rep. 465.

(2) *Davy v. Milford*, 15 East, 559.

(3) *Thompson v. Roy. Ex. Ass. Co.* 16 East, 214. V. Supr. 488.

(4) *Biays v. Ches. Ins. Co.* 7 Cranch, 415.

(5) *Guerlain v. Col. Ins. Co.* 7 Johns. 527.

(6) *Gracie v. Maryl. Ins. Co.* 8 Cranch, 84. See also 1 Wheat. 219.

All other perishable articles.

question to be considered, when the policy is restricted to a case of total loss. (1)

A destruction of a part of the subject insured, with the exception of partial loss, has been held, in one case, to be a total loss of such part within the policy. Where about five sixths of a quantity of *flax* insured, was lost by shipwreck, and the net sales of the part saved amounted to less than three per cent on the prime cost of the whole quantity, Lord Ellenborough said, 'there is nothing in reason or precedent to prevent us from saying that the assured may recover, for no case has been cited to show, that where the least particle of the thing insured exists *in specie*, the assured shall be prevented from recovering the value of that which has been totally lost. I consider that the assured are entitled to recover, as for a total loss, the value of that which was in fact totally lost.' (2)

But in a case where, according to the statement of the counsel of one of the parties, a part of the sugar insured, was washed out of the hogsheads, the same court held that it was not a loss under the policy, but came within the exception. (3)

Hides insured free of average, were put into lighters to be landed at Nieu Diep, and one of the lighters was sunk. Only a part of the hides were recovered. The assured claimed for a total loss of the hides not recovered, and for the expenses of recovering the others. Mr. Justice Livingston, giving the opinion of the court, said, 'When only a part of a cargo, consisting all of the same kind of articles, is lost, and the residue arrives in safety at its port of destination, the loss cannot but be partial.'

In regard to the expenses of recovering the hides, an indemnity against which was claimed under the clause authorizing the assured 'to sue, labour,' &c. the judge said, 'The parties certainly meant to apply this clause only to the case of those losses or injuries for which the insurers, if they had happened, would have been responsible. The underwriters not being answerable for the principal loss, cannot be so for the expenses in recovering the property.' (4)

In New York the same construction was put upon a policy against 'general average, and such total loss only as might arise by the absolute destruction of the property.' The court said, 'The idea, that for each item or article of the cargo which was totally lost, the insurers are liable, is not well founded. The insurance was upon so much cargo as an integral subject.' (5)

Upon the same principle it has been held that a total loss cannot take place under this exception, after a part of the goods, coming within the exception, have been safely landed. (6)

All policies, after the enumeration of articles on which the insurers are not liable for average, contain the general provision, that the insurance is made free of average also on all articles perishable in their own nature. But I have not met with any decision in which the exception has been held, in virtue of this general clause, to be applicable to an article not specifically named in the policy. One instance has occurred to me in which

an article, not named in the policy, under this exception, was considered to be perishable in its own nature, but it does not appear that there is any practice in this respect so general, as to amount to what can be considered a usage. Experienced insurers, of different places, say that they have hardly known of an instance in which the exception has been actually applied to any article besides those specifically enumerated.

In regard to the general exception of average, under three per cent in the English and French, and under five per cent in the American policies; it is necessarily applied exclusively to the subject on which the average happens, in those places where ship, freight, and cargo are insured in separate policies. And where these subjects are insured together in the same policy, this exception is applied by many, and I believe by the greater number, if not by all insurers, to that subject, exclusively, on which the average takes place. The rate of three or five per cent is considered to have reference to the ship, freight, or cargo separately, in the same manner as if they were insured in separate policies.

Whether the exception of average under five per cent generally, is computed upon different subjects insured in the same policy.

In computing the three or five per cent, it is evident that the abatement of one or two per cent from losses, ought not to be first deducted. The stipulation is, that the insurers will pay a loss which exceeds one twentieth part of the interest, but the deduction of the one or two per cent, in computing this twentieth part, would so far be a departure from the stipulation. If it is to be deducted from the loss, it ought to be added, in estimating the value of the goods, &c. lost, which would be equivalent to omitting it altogether.

The abatement of one or two per cent ought not to be deducted, in computing the three or five per cent.

In making a computation in respect to this general exception, successive losses, wholly unconnected, must not be added together to make the amount; nor is a general average to be included for this purpose. But a distinction is made between the different interests in respect of adding successive losses. If the ship be damaged during a storm, and subsequently, in a different part of the voyage, and without any connexion whatever with the storm, she is damaged by stranding, the insurers are not liable for either loss, unless it exceeds the rate per cent of the general exception, and only for the loss which exceeds that rate.⁽¹⁾ But it is not usual, and it would be very difficult, to make any such distinction in regard to the freight or cargo. The rule more generally, if not uniformly and universally adopted, is, to consider a loss upon freight as coming within the stipulation of indemnity, if it amounts to the specified rate upon the freight pending at one time, although the amount of loss may be occasioned by successive accidents. But a question very rarely occurs respecting the application of this exception to freight.

One loss must amount to three or five per cent to make the insurers liable.

⁽¹⁾ Stevens on Av. P. iv. art. 3. p. 214.

The amount of damage upon goods is usually ascertained at the port of delivery, and no distinction can ordinarily be made in regard to the damage occasioned at different periods. If the whole damage exceeds the rate per cent of the exception, the insurers are considered to be liable. It would in general be

impracticable to distinguish damage occasioned to goods by the same peril, as by perils of the seas for instance, at different times. But it does not appear by any known and established usage, that the insurers would be liable for the aggregate damage exceeding the rate at which the exception is fixed, partly occasioned by fire at one time, and partly by perils of the seas, barratry, or capture, at another; if the damage from either of these causes were less than that rate. It seems on the contrary, from analogy to the usage in regard to a policy upon the ship, and from the more obvious construction of the language of the exception, that the insurers are not liable in such case. The construction generally adopted, in this respect, is, that the insurers are liable wherever what may properly be considered *the same loss*, exceeds the rate at which the exception is limited.

The same rule is applicable to the exceptions of partial losses on particular articles; the insurers are not liable, except in case of damage, in what may properly be considered to be the same loss, exceeding the rate of the exception.(1) In determining what injuries and damage may be considered to be the same loss, and what are distinct losses, there is room for doubt and a diversity of opinion. But as the exception is limited to particular average, the amount of a general average, cannot be included to make the loss exceed the rate of the exception; to render the insurers liable, the particular average must exceed that rate.(2)

The exceptions are necessarily limited, in their application, to the amount at risk under the policy at the time of the loss. Insurance was made upon a cargo of slaves, 'free from average, under five per cent, from insurrection.' Out of forty-nine slaves on board at the time, seven were killed in suppressing an insurrection. The number lost did not amount to five per cent of the number subsequently on board, and at risk within the policy. The jury found, in compliance with what was stated by an underwriter, that the exception had reference to the number of slaves on board at the time of the loss; and Lord Kenyon acquiesced in this construction.(3)

If only one interest is at risk, as the ship, and a loss, in the nature of general average, is incurred, as cutting the cable, which does not amount to the rate of exception applicable to all partial losses, it is customary to pay such a loss; for although there are no other interests at risk to contribute to this loss, yet inasmuch as it is in the nature of a general average, insurers consider themselves liable for it. Mr. Stevens thinks that such a loss ought to be paid,(4) and the custom in the United States, in many offices at least, if not generally, is to pay a loss of this sort.

In case of insurance upon different kinds of goods, on some of which the insurers are exempted from particular average under a certain rate per cent, a question occurs respecting the amount upon which the estimation is to be made. If insurance is made upon sugar and cocoa, free of average under ten per

(1) *Stev. on Av. P. iv. art. 3. p. 214.*

(2) *4 Mass. Rep. 548.*

Exceptions estimated upon the amount at risk at the time of a loss.

(3) *Rohl v. Parr. 1 Esp. 445.*

Loss in nature of general average, when only one interest is at risk.

(4) *P. IV. a. 3. p. 214.*

Upon what value the exceptions are to be computed.

cent, and coffee and rice, free of average under seven per cent, with the general exception of losses under five per cent, a question occurs, whether the insurers are liable for a loss upon the sugar exceeding ten per cent of the value of that article, or only in case of its exceeding ten per cent on the value of the sugar and cocoa, and all other articles at risk, subject to the same exception. Another question arises, whether a loss must not only amount to the specified rate per cent of the value of the article or class of articles, upon which it takes place; but must also amount to five per cent of the value of all the goods at risk under the policy. The form of the policy may exclude this question, by providing, as is done in some policies, that a particular average, to be payable, 'must amount to five per cent upon the whole interest at risk;' (1) or the value 'thereby insured;' or by containing the general provision, that a loss shall not be paid, unless it amount to five per cent, without making any distinction as to the articles to which this exception applies. (2) This form of the exception makes it requisite that the average, whether it happen upon a memorandum article or any other, should amount to five per cent of the value of all the goods at risk.

(1) A Charleston form.
(2) New York and Baltimore forms.

But in the form of the policy most extensively used, this general exception is not expressed as in the policies above-mentioned. The memorandum of English policies, and those used in Boston and Philadelphia, provide, that certain articles shall be free of average, or free of average under a certain rate; and it is added, that 'all other goods,' or else, 'all other goods, the ship and freight,' shall be free of average under three or five per cent. This form of expression gives occasion to the question, whether the exception is to be applied to the value of all the goods at risk, or only that of the goods subject to the exception.

A case occurred in Boston in 1809, under a policy upon sugar free of average under seven per cent, and upon coffee and pepper, neither of which was enumerated in the memorandum, and both of which were accordingly free of average under the general exception of five per cent. A loss happened upon the coffee exceeding five per cent of the value of that article; but not amounting to five per cent of the value of the goods at risk under the policy. It was settled, by referees, that the assured was entitled to recover for this loss. The referees said, 'By the policy the cargo is divided into two classes or masses of property, upon one of which the underwriter is exempted from loss under seven per cent, upon the other, from loss under five per cent. A partial loss that happens to the articles composing one of said classes, is to be computed on the value of such class, in the same manner as if the insurance on one class was effected in one policy, and the insurance on the other class, in another policy.' The practice in Boston, and the neighbouring ports, has since been governed by this award.

The principle upon which each exception is applied must be the same, or at least the different exceptions must not be applied upon principles that are inconsistent with each other:

The exception of average under seven per cent on sugar, should not be applied exclusively to the value of the sugar at risk, while the exception of average under five per cent on pepper, in virtue of the general clause relating to 'all other goods,' is applied to the value of the pepper, coffee, sugar, and all other articles at risk. Unless the policy makes some distinction in this respect, the different exceptions ought, it seems, to be applied in the same manner, or according to the same general rule. Every article at risk is subject to some exception, which must be estimated upon the value of the article itself, or upon the value of all the articles at risk, subject to the same exception, or upon the value of all the goods at risk. The general exception of losses under five per cent on 'all other goods,' cannot conveniently be estimated upon the value of the particular kind of articles at risk on which the damage happens, since this raises the difficulty of determining what articles are of the same kind. Suppose the invoice to consist of nails, bar iron, and iron nail-plates; and an average to take place upon the nails. A doubt would occur whether all these articles are of the same class, and whether the estimation is to be made upon the value of the nails only, or upon that of all three, or of any two of the articles. This difficulty would occur in innumerable instances, and there would be no principle upon which it could be removed. The estimation of the general exception, therefore, upon the value of the same kind of article at risk, seems to be impracticable and out of the question. A choice must then be made between the value of each class to which the different exceptions apply, and that of all the goods at risk. The rule of estimating the exception upon the value of the several articles at risk, subject to the same exception, was considered by the arbitrators, in the above case, as being more uniform in principle, and more consistent with the object in view, in introducing the exceptions, than an estimation upon the value of all the goods at risk would be. As the parties had classed certain articles together in the several exceptions, and made each class subject to the same exception, the construction in respect to the articles belonging to each class, should be the same, in relation to the exception, as if but one article had been at risk under the exception, equal in value to the several articles. Upon these grounds the award was made, and the rule adopted by it has since been adhered to in Boston, and the neighbouring ports.

(1) *Essay on*
Av. Part IV.
a. 3. p. 211.

But Mr. Stevens states a different rule as being adopted at Lloyd's. He says, 'If several articles be insured together, free of average under five per cent, and average be claimed on the whole, the claim should be analysed to find if each be damaged five per cent, e. g. if a claim be made of 100*l.* i. e. ten per cent, on flax and hemp valued at 1000*l.*; unless [the average on] each of them separately amount to five per cent, the claim can be substantiated on only one of them.'⁽¹⁾

I have not ascertained what is the practice in this respect in other parts of the United States, but from what I have learned,

has an indirect relation to this subject, I should infer that rule stated by Mr. Stevens, is more generally adopted in respect to the articles specifically enumerated in the memorandum. The different manner of introducing the general exception of all losses under five per cent, in some policies, which has been noticed above, would evidently in part, take a case out of the rule adopted in Boston.

A question occurs, whether the expenses of surveys, certificates, protests, and of the adjustment of the loss are to be included in determining whether a loss comes within any exception. The ordinance of Hamburg, 'the insurer is obliged to pay a particular average if the same amount to three per cent after commission of the *despacheur* of averages is deducted.'⁽¹⁾ It is adopting the rule, that the charges for ascertaining the amount of the loss should fall upon the party who must have sustained the loss, had its amount been ascertained without any expense. This rule seems to be perfectly reasonable and to be founded upon the plainest principles, and it applies with equal propriety to all the expenses incurred for the purpose of ascertaining and proving the loss; that is, to surveys, protests, certificates, the like.⁽²⁾

Mr. Stevens says he has been informed, that the 'intention of the memorandum, when first inserted, was, that the five or three per cent, should, in all cases, be deducted from the average, the underwriters paying the balance.'⁽³⁾ But the practice in England is, to consider the underwriters liable for the whole of the loss where it exceeds the rate at which the exception is fixed. The practice is the same in Boston, and other places in the United States, as far as I have been informed in this respect; as the policy contains a provision that the insurer 'will pay the excess of damage above the rates limited.'⁽⁴⁾ I have, however, met with only one instance of such a provision.

Whether the expenses of ascertaining and proving the loss, are to be included.

(1) Tit. xxi. art. 11. 2 Mag. 238.

(2) See Steven's Essay on Av. Part IV. a. 3. p. 216.

(3) Steven's Essay on Av. Part IV. a. 3. p. 213. n.

(4) A Savannah form.

CHAPTER XIX.

PRELIMINARY PROOF.

It is a pretty general practice to allow some time, more or less, according to the law or usage of the particular place, from the date of the claim, to thirty, or sixty days, between the time of the claim and the payment of it.⁽⁵⁾ The English marine policies, however, contain no provision on this subject. The policies made in England against fire, in some instances at least, contain a provision in regard to the proof, on the production of

(5) 1 Mag. 89. s. 76.

(1) *Routledge v. Burrell*, 1 H. Bl. 254.

which the loss shall be paid. (1) The American marine policies, universally contain a provision, that a loss shall be paid in thirty, or sixty, or ninety days, or some other time, *after proof of the loss*. The time agreed upon in most policies is sixty days. The evidence of the loss under this provision of the policy is called *preliminary proof*.

(2) *Barker v. Phœn. Ins. Co.* 8 Johns. 237.

The abandonment, and the furnishing the preliminary proof, are distinct acts, and must not be confounded. (2) We have already seen what constitutes an abandonment, and that it is made only in case of total loss, but preliminary proof is requisite in every description of loss.

What is sufficient preliminary proof.

In regard to the kind of proof requisite under this provision, Chief Justice Thompson said, in giving the opinion of the court, that it 'requires only reasonable information to be given to the underwriters, so that they may be able to form some estimate of their rights before they are obliged to pay. This clause has always been liberally expounded, and is construed to require only the best evidence of the fact which the party possesses at the time.' (a)

(3) 8 Johns. 307, *Anthon's Cas.* N. P. 16. n.

The ordinary proofs of a loss are the invoice, bill of lading, &c. to show the interest of the assured; the survey of the vessel or cargo, protests, consular certificates, letters of the captain or other correspondents, &c. to show that a loss has taken place. (3) Where the captain had been made prisoner, and the assured, being informed of the loss by the pilot, communicated his information to the underwriters; Chief Justice Parsons said, in giving the opinion of the court, 'The evidence of the loss was sufficient. Nothing can be objected but the want of affidavit, which it is not usual to send. The master was a prisoner, and could make no protest, which is the usual evidence.' (b) Letters from the master or other person, giving an account of a loss, have been held to be sufficient preliminary proof, (c) as also the protest of the master and mate. (4)

(4) *Talcott v. Mar. Ins. Co.* 2 Johns. 130. If the insurers demand a document, this may impose the obligation of producing it.

It depends upon the provisions of the policy, and also in some degree, upon the demand made by the insurers, whether the production of any particular documents is necessary. Where it was agreed, that the insurers should not be liable for a loss on a vessel insured, if, upon a regular survey, she should be condemned on account of being unsound or rotten; on a claim being made for a loss, the insurers required the production of a survey which had been made upon the vessel. The assured did not produce the survey. The court said, 'We are of opinion, that the assured was bound to produce the survey, or give some account of its non-production. It is possible the survey might have shown that the vessel was unable to prosecute her voyage on account of her being unsound or rotten. It was a

(a) *Lawrence v. Ocean Ins. Co.* 11 Johns. 259. See also *Barker v. Phœn. Ins. Co.* 8 Johns. 237; *Talcott v. Mar. Ins. Co.* 2 Johns. 130. (b) *Munson v. New Eng. Mar. Ins. Co.* 4 Mass. Rep. 88. See also *Johnston v. Col. Ins. Co.* 7 Johns. 315. (c) *Craig v. Un. Ins. Co.* 6 Johns. 226; *Barker v. Phœn. Ins. Co.* 8 Johns. 237.

material document to the insurers in forming a judgment, whether the loss claimed was total.'(1)

The conduct of the insurer may amount to a waiver of his rights in respect of preliminary proof. Where the assured produced to the underwriters the heads of the master's protest, and his letters, in proof of barratry, and the question made between the parties, was, whether the facts stated, amounted to barratry; Mr. Justice Thompson, giving the opinion of the court, said, 'Under these circumstances, even admitting the documents not to be competent preliminary proof, I should consider the underwriters as having waived the claim to more formal proof.'(2) And the protest of the captain, relating to a loss, being produced to the insurers, but no proof of interest furnished, the court said, 'As the underwriter made no objection to the sufficiency of proof, and placed his refusal to pay, on the ground of deviation, he must be deemed to have waived the proof of interest.'(3)

The thirty, or sixty days, or other time of credit for the loss, must, of course, be computed from the time of the production of the proof, and not from that of abandonment. Where an abandonment was made on the 5th of the month, and the preliminary proof was exhibited on the 21st, the sixty days were computed from the 21st.(4)

As the loss must be total at the time of the abandonment, in order to entitle the assured to recover the value at which the subject is insured;(5) proof of the state of facts, at the time of abandonment, might be considered to be a part of the preliminary proof. But as this would very much extend the credit for the loss, in case of a constructive total loss at a great distance from the residence of the parties to the policy, and would give an indirect effect to the rules respecting preliminary proof, quite foreign to the object and principles of these rules, the construction which would give the different stipulations effect, without causing them to interfere with each other, seems to be, to consider the proof of the state of facts, at the time of abandonment, not to be a part of the preliminary proof. Property being captured, at a great distance from the parties, and abandoned, the assured has a right to recover, unless subsequent facts have defeated his right. The proof of the capture, may, in this case, be considered to be the preliminary proof, and the fact that the property has not been released in the mean time, is only necessary to show that the right of abandonment had not been divested before the time of abandoning. Upon this construction the credit will begin to run from the time of exhibiting proof of the capture.(6) If, at the expiration of the term of credit computing from that time, the state of facts at the time of abandonment is known, the loss will be payable. But it can hardly be supposed that the assured can recover for a total loss, before it is known whether the facts authorized an abandonment at the time when it was made. To hold that he could recover in this case, would be to set aside the doctrine which makes the right of abandoning depend upon the existing facts. Although it has been in-

(1) *Haff v. Mar. Ins. Co.* 4 Johns. 132. See also *S. C. Anthon's Cas.* N. P. 14.

(2) *M'Intire v. Bowne*, 1 Johns. 229.

(3) *Vos v. Robinson*, 9 Johns. 192.

The term of credit for the loss commences from the time of making preliminary proof.

(4) *Barker v. Phœn. Ins. Co.* 8 Johns. 237.

(5) *Supr.* 454.

(6) 3 Binn. 289.

(1) 3 Binn. ut
Supr. estimated that the assured may recover in this case,(1) yet this seems to be very questionable. The doctrine that abandonment must be authorized by the existing facts, seems to require that the right to payment of a loss, should be suspended, and the term of credit prolonged, until it appears whether the facts authorized an abandonment. To hold otherwise, seems to be adopting the doctrine, that the assured may recover for a total loss, without showing that he has a right to recover.

CHAPTER XX.

ADJUSTMENT OF A CLAIM FOR A LOSS

What will be
considered an
adjustment.

(2) Park, 192.
(3) Bell v.
Smith, 2
Johns. 98.
(4) M'Lellan
v. Maine F.
& M. Ins. Co.,
12 Mass. R.
246.

AN adjustment of a loss, it seems, is, in London, usually made by endorsing on the policy, 'adjusted this loss at' so much per cent, or other note to this effect, which is signed by the underwriter.(2) But the form of the adjustment is not material, it is sufficient if the underwriter has acknowledged the claim, and the parties have agreed on its amount. An acceptance of an abandonment is an adjustment of a loss as total,(3) and payments made on a claim of a total loss, being held to be equivalent to an acceptance of an abandonment, were in effect an adjustment.(4)

A policy contained a stipulation for a return of two per cent of the premium on arrival, and this return was demanded by the assured, and made by the underwriter, and a memorandum was made upon the policy to signify that it had been adjusted. After this the assured claimed an average loss. Gibbs, C. J. 'The return of two per cent on arrival, means, that if the adventure be safely terminated, and the underwriter free from all danger of loss, and discharged from all other claims, he will return a portion of the premium. If any thing of risk remained it should have been communicated to the underwriter when the return premium was claimed. If the assured intended to reserve a claim, they should have stipulated for it.' And he left it to the jury, being a special one, whether all claims under the policy, had not been adjusted by the demand and payment of a return of premium; who found that the insurer was thereby discharged from his liability under the policy.(5)

(5) May v.
Christie, 1
Holt, 67.
(6) Newbp.
Ins. Co. v.
Oliver, 8
Mass. Rep.
402.

An award of arbitrators under a submission, not in writing, will be as binding in regard to a claim for a loss, as in other cases; that is, the circumstance, that the submission is by *parol*, is immaterial.(6)

An adjustment may be made conditionally. After an adjustment and payment of a loss by a part of the underwriters upon a policy, another underwriter subscribed an endorsement on the policy, 'Adjusted thirty-three pounds per cent, on account, upon my subscription to this policy, until the account of the proceeds of the goods insured can be made up, when a final loss is to be paid to the same amount, as by the other underwriters.' Dallas, J. 'The undertaking of the insurer appears to be prospective, and his subsequent liability depended on the making up of the account. The assured should have proved that they had made and rendered to him an account of the proceeds. The undertaking of the underwriter to pay the loss, is qualified by a condition precedent, which has not been performed.' (1)

Conditional adjustment.

(1) *Gammon v. Beverly*, 1 Moore, 563; S. C. 8 Taunt. 119.

An adjustment, when duly made, has the effect, like any other settlement, arbitration, or compromise, of concluding the parties. An adjustment being made in writing, or by award of arbitrators, the assured may bring an action upon it without setting forth the policy particularly, or he may bring an action upon the policy in the same manner as if there had been no adjustment, and give the adjustment in evidence of a loss and of its amount. (2) And if there be no evidence to impeach the adjustment, it will fix the rights of the parties. (a)

The effect of an adjustment.

(2) *Rogers v. Maylor*, Park, 194; *Christian v. Combe*, 2 Esp. 489.

But where, immediately after signing the adjustment, doubts arose in the minds of the insurers as to the honesty of the transaction, and they called for other proof, the adjustment was held not to be binding. (b) This case cannot be consistent with those above cited, without supposing these doubts to have been expressed, and further proof to have been demanded, before the adjustment could be considered as concluded, and while something remained to be done, equivalent to the delivery of a deed after it has been executed; for the doubts or demands of one party, after a transaction is completed, cannot make it the less binding.

On an application to set aside an adjustment, the court in New York said, 'It appears that, previous to the adjustment, all the facts were communicated to the underwriters. The adjustment was made by the underwriters with their eyes open. An adjustment cannot be opened, except on the ground either of fraud, or mistake, from facts not known.' (3)

An adjustment can be set aside only for mistake or fraud.

(3) *Dow v. Smith*, 1 Gaines, 32.

Any agreement which one party is led to make in consequence of the fraud of another, is not binding upon the party who would not have made the agreement but for the fraud.

In regard to mistakes, Lord Kenyon is reported to have intimated to the jury, that an adjustment of a loss would not be binding upon a party who made it under a mistake of the law, or of facts. (4) But Lord Ellenborough afterwards, with the concurrence of the other judges, expressed his dissent from this

A mistake of law does not avoid an adjustment.

(4) *Rogers v. Maylor* 2 Esp. 489.

(a) *Da Costa v. Firth*, 4 Bur. 1966; *Hog v. Gouldney*, Park, 193; *Hewit v. Flexney*, Park, 194; *Shepherd v. Chewter*, 1 Camp. 274; *Rayner v. Hall*, 4 Taunt. 662. (b) *De Garron v. Galbraith*, Park, 194. See remarks upon this case, Park, 195; Marshall, 635.

opinion of Lord Kenyon, and said, 'every man must be taken to be cognizant of the law, otherwise, there is no saying to what extent the excuse of ignorance might not be carried.' And the court was accordingly of opinion, that where the insurer paid a loss with the knowledge of the facts, but without knowing that he was legally discharged from his liability under the policy upon those facts, he could not recover the money back as paid by mistake.(1)

(1) *Bilbie v. Lumley*, 2 East, 469.

A mistake of facts makes an adjustment void.

(2) *Dow v. Smith*, 1 Caines, 32.

(3) *Elting v. Scott*, 2 Johns. 157. See also *Stevens v. Lynch*, 12 East, 38.

It was held in New York, that a mistake, to set aside an adjustment, must be of 'facts not known,'(2) and that a misapprehension of the law, would not be a ground of setting aside an adjustment.(3) If an adjustment be made from a mistake of a fact, into which mistake one party is led by the concealment or misrepresentation of the other, or without any neglect on his own part, it will not be binding upon the party, who assented to it, in consequence of such mistake. An adjustment is set aside on this ground, very much upon the principles on which a policy is made void, by a concealment or misrepresentation. It is a general rule, that money paid in consequence of a mistake of facts, may be recovered back; and that a promise to pay money is not binding, if made in consequence of such a mistake, where the party promising has not fallen into the mistake by his own negligence, or is not understood, from the circumstances, or his agreement, to take the risk of the facts.(a)

(4) *Steel v. Lacy*, 3 Taunt. 285.

Thus, where the underwriters paid the loss on a vessel that was condemned for want of a sea-letter, a ground of condemnation which exonerated the insurers, but of which they had no knowledge at the time of paying the loss, Chief Justice Mansfield said, 'It seems to be clear that an adjustment is not binding, if it in any degree proceeds on a mistake.'(4)

(5) *Faugier v. Hallett*, 2 Johns. Cas. 233.

Where the assured had stated to the underwriter that a greater part of the property had been saved, and from a misapprehension in this respect, the insurer had adjusted the loss at ninety-eight per cent; Mr. Justice Radcliff said, 'Where one party is obliged to act on the representation of another, he is not concluded, if that representation be untrue. The adjustment is *prima facie* evidence only, and may be rebutted.'(5)

(6) *Haigh v. De La Cour*, 3 Camp. 319.

Upon the same principle an adjustment upon the production of fictitious bills of lading, in proof of the interest of the assured, was not binding upon the underwriter.(6)

(a) 1 T. R. 712; 4 Dall. 109; 8 Johns. 384; 3 Mass. Rep. 74; 4 Mass. Rep. 341; 9 Mass. Rep. 408.

CHAPTER XXI.

RETURN OF PREMIUM.

Section 1. Where there is no Risk.

It is a general rule, subject to some exceptions, that if the thing insured has never been brought within the terms of the contract, so that the insurer might have been liable for a loss occasioned by the perils insured against, the premium must be returned to the assured, deducting, however, one half per cent on the amount insured.⁽¹⁾ 'Where the risk has not been run,' says Lord Mansfield, 'whether it be owing to the fault, pleasure, or will of the assured, or to any other cause, the premium shall be returned.'⁽²⁾ But if the property has, for however short a time, been exposed to the risks insured against, and within the conditions of the policy, in such manner that the insurers might have been liable for a loss, no return of premium for insurance of the property so at risk can be claimed. If the policy attaches but for a single moment, says Mr. Justice Van Ness, there can be no return of premium.⁽³⁾

The freight of a ship was insured 'from Cuba to ports in St. Domingo, and from thence to ports in the United Kingdom.' The ship was let for the voyage by a charterparty, in which the charterer agreed to pay a stipulated amount of freight. She had sailed from the island of Cuba to St. Domingo on the voyage insured, but afterwards, and before any cargo was taken on board, the ship deviated. The assured claimed a return of premium. Lord Ellenborough said, 'Had the ship been lost while waiting to take in a cargo, the underwriters would have been liable for the whole sum insured. The charterparty created an interest on which the policy had attached, and there had been an inception of the risk.'^(a) He accordingly held that the assured was not entitled to a return of premium.

The rule that the premium is to be returned, if the property is not at risk, enables the assured to defeat the contract by not putting the property at risk. But the underwriter can have no objection to the exercise of this right, since in all cases he retains one half per cent on the amount insured, unless it be otherwise expressly stipulated in the policy.^(b)

The custom of retaining the half of one per cent is general in the United States, as well as all other places where insurance is practised. With the exception of this deduction, the premium must be returned if the insurer has run no risk. A *sloop* being described in the policy as a *brig*, the policy did not attach, and

If the property is not put at risk the premium must be returned.

(1) 1 Emer. 62; 1 Mag. 80; 1 Ves. 319; *Bermon v. Woodbridge*, Doug. 781; *Boehm v. Bell*, 8 T. R. 154; *Martin v. Sitwell*, 1 Show. 156; *Siffkin v. Allnutt*, 1 M. & S. 39; *Graves v. Mar. Ins. Co.* 2 Caines, 339; *Forbes v. Church*, 3 Johns. Cas. 159; *Lawrence v. Ocean Ins. 11 Johns. 262*; *Mar. Ins. Co. of Alexandria v. Tucker*, 3 Cranch, 385. (2) *Tyrie v. Fletcher*, Cowp. 666. (3) *Hendricks v. Conn. Ins. Co.* 8 Johns. 1. See also *Loraine v. Tomlinson*, Doug. 686; *Steinbach v. Col. Ins. Co.* 2 Caines, 129; *Taylor v. Lowell*, 3 Mass. Rep. 343.

(a) *Moses v. Pratt*, 4 Camp. 297. (b) *Molloy*, l. 2. c. 7. s. 12; *Marsh*. 676; *Loccenius*, l. 2. c. 5. n. 16; 2 Emer. 168.

(1) 1 Emer.
161.

(2) Robert-
son v. Unit.
Ins. Co. 2
Johns. Cas.
250.

(3) Wadding-
ton v. Unit.
Ins. Co. 17
Johns. 23.

(4) Steinbach
v. Rhineland-
er, and
Steinbach v.
Church, 3
Johns. Cas.
269.

(5) Tom. 2.
p. 156. for
which he
cites Strac-
cha, gl. 6. n.
9. and San-
terna, p. 3.
n. 19. & 21.

(6) Routh v.
Thompson, 11
East. 428.

Case of the
risk having in
fact expired
before the po-
licy is made.

(7) Park, 562.

Case of a
part only of
the value in-
sured being at
risk.

Return for
prior insu-
rance.

(8) Looce-
nius, l. 2.
c. 6. s. 8;
Amery v.
Rodgers, 1
Esp. 207;
Holmes v.
Unit. Ins. Co.
2 Johns. Cas.
329; Polloch
v. Donaldson,
3 Dall. 510.
(9) Eyre v.
Glover, 16
East, 218.

the premium was returned.(1) A bottomry interest not being insured *as such*,(2) and goods being insured, but none being put on board answering to the description in the policy, the assured had a right to repayment of the premium.(3)

In case of insurance upon a vessel that had been at the place where the risk was to commence, it appeared that the insurance had been made through mistake, and that the party who effected the policy had no interest, nor any authority to insure for those who had an interest, and who were also named in the policy. The court decided in favour of a return of premium. Mr. Justice Kent, however, dissented from this opinion, on the ground that the person who effected the insurance, after having procured a policy, in which, those who in fact had an insurable interest were named, was not at liberty to allege that he had no authority from them.(4) Upon this principle Emerigon says, if it be stated in the policy that the assured *himself* loaded the goods on board, he shall not be permitted to allege the contrary.(5)

But if the assured is not precluded by the contract itself, or the circumstances, from alleging a mistake or want of interest, and he shows that the policy was effected through a misapprehension; that he supposed himself to have an interest, when in fact he has no interest; he is entitled to a return of the premium.(6)

The risk may have terminated, in fact, before the policy is made, yet if it be so made that it would have applied to any loss that might have happened during the risk, no return of premium can be demanded;(7) that policies often bear such a construction we have seen under a preceding title.

Upon the same principle, which entitles the assured to a return of the whole premium, where he has no interest at risk, he is entitled to a return of a part of the premium, where only a part of the value insured is ever at risk under the policy.(8)

It has been held that a part of the premium may be returned in a policy on profits for short interest;(9) that is, if the profits on a certain quantity of goods be insured, and only a part of the goods are put at risk.

American policies contain a provision that, 'if the assured has made any prior insurance upon the property, the insurers shall be answerable only for so much as the amount of such prior insurance may be deficient towards covering the property, and shall return the premium upon so much of the sum insured as they shall be exonerated from by such prior insurance,' excepting half per cent; or other words equivalent.

Where the expression was *prior in date*, the court said, '*prior in date*, as used in policies, is equivalent to *prior in time*;' and different policies, bearing the same date, and being executed on the same day; evidence was admitted to show which was executed first.(a)

In a policy effected in New York, on the 29th of May, it was stipulated to return fifteen per cent 'in case an insurance had

(a) Brown v. Hartford Ins. Co. 3 Day, 58.

been effected in Europe.' Another policy was effected at Hamburg on the 19th of June following. It was held that this stipulation referred to a prior insurance only, and accordingly that the assured were not entitled to a return of premium.(1)

It has been held in New York, in an action on a policy in which it was stipulated that this clause should take effect in case of a prior insurance 'on the premises aforesaid,' that to make the clause applicable, the two policies must amount to a double insurance, or that they must be on the same subject, against the same risks, and for the same time. The policy in question was made in New York on the 5th of October, 'at and from Bayonne to the first port the ship might make in the United States.' A previous policy had been made at Philadelphia on the 27th of September, on the same cargo, 'from Bayonne to New York.' The risks differed in two respects, that in the New York policy commenced *at* Bayonne, and attached on a voyage to any port in the United States; whereas, the risk in the Philadelphia policy commenced only *from* Bayonne, and attached only on a voyage to New York. The New York insurers might therefore have been liable for a loss to the whole amount insured by them, if it had happened *at* Bayonne, or on a voyage to some port of the United States other than New York. It was therefore decided that the assured was not entitled to a return of premium under this clause. And since the New York underwriters had been liable for the risk on the whole amount insured by them *at* Bayonne, notwithstanding the Philadelphia policy, the assured was not entitled to any return of premium; on the principle that where the risk has attached, though for a short time only, a return cannot be claimed.(2)

If there is no risk of the kind insured against, the assured is entitled to a return of premium. Insurance being made, by a memorandum endorsed upon the policy, against the risk arising from an existing blockade of Martinico, when no such blockade existed, Chief Justice Parsons said, 'The memorandum does not extend to any risks except those which might arise from a blockade, which never existed. There could not therefore be any possible loss incurred by the underwriters.' It was accordingly held that the assured was entitled to a return of premium.(3)

This clause respecting a return on account of prior insurance, rests upon the same principle with a return for the excess of premium, in a case of over insurance; where no risk has been run, no premium is due. Both have reference to the value of the insurable interest upon which the premium is stipulated. But another question arises under the subject of return of premium, which relates to the duration of the risk. The amount of a premium is regulated, or rather estimated, according to the amount insured, the risks insured against, and the time for which they are insured against. In regard to the number and kind of risks, whenever the insurer is liable for any, he is liable for all of them; whenever the policy attaches, the underwriter has the risk of all the perils embraced by the policy, whatever that risk may be. In time of peace, for instance, the

(1) New York Ins. Co. v. Thomas, 3 Johns. Cas. 1.

The clause as to prior insurance held to be applicable only where the prior policy is upon the same subject, and against the same risks.

(2) Col. Ins. Co. v. Lynch, 11 Johns. 233.

Insurance against a particular blockade when there was no such blockade.

No return is made on the ground that the property has been exposed to only a part of the risks insured against.

(3) Taylor v. Sumner, 4 Mass. Rep. 56.

risk of capture is small, but whatever it is, the underwriter assumes it. There is no return of a part of the premium, because the property is exposed only to a part of the risks, unless it be expressly stipulated for in the policy.

Successive risks insured against in the same policy.

But it is otherwise in regard to the value of the interest insured, for if only a part of it is ever at risk, the premium for the excess is to be returned. In regard to the other circumstance upon which the amount of the premium is estimated by the parties, namely, the duration of the risk, we have already seen that if the risk is run for a time ever so short, the underwriter is entitled to retain the premium. But what premium is he entitled to retain? The obvious answer is, the premium for the risks that has commenced. This gives rise to the question, what risk may be said to have commenced under any given circumstances. Suppose for instance, that a ship or cargo is insured at and from one port to a number of others in succession, or from the date of the policy for a number of months or years; does the risk commence for the whole period at once? Is it one entire risk, or a succession of risks? If it be one risk, then, when it has once begun to run, the insurer is entitled to the premium for the whole period; if a number of successive risks, then, only to the premium for the period of the risk that may have commenced; and the premium must be returned for the risk that had not commenced, in the same manner as for the value of the goods not shipped.

From London to Halifax with warranty of convoy from Portsmouth, held to be successive risks, and the premium apportioned.

This question has been embarrassing to the courts, and has been decided with some diversity of opinion. A ship being insured 'from London to Halifax, warranted to depart with convoy from Portsmouth,' was too late for the convoy from Portsmouth, upon which the assured requested the underwriters to take the risk without convoy, on receiving an additional premium at the usual rate, or to return a part of the premium, considering the risk as terminating at Portsmouth. But they refused to agree to either of these propositions. The jury found that it was the custom in such case to return a part of the premium. Lord Mansfield said, 'I have not the least doubt about this question. These contracts are to be taken with great latitude; the strict letter is not to be so much regarded, as the object and intention. Equity implies a condition 'that the insurer shall not receive the price of running a risk, if he run none. This is a contract without any consideration as to the voyage from Portsmouth to Halifax, for the assured intended to insure that part of the voyage, as well as the former part, and has not. This case, then, is within the general principle of actions for money had and received. It has been objected that the voyage being *begun*, the premium cannot be apportioned. But I can see no force in this objection. This is not a contract so entire that there can be no apportionment; for there are two parts in this contract, and the premium may be divided into two distinct parts, relative, as it were, to two distinct voyages.' He said he did not found this opinion upon the usage, although he thought it showed that the principle assumed by the court 'was agreeable to the general sense of mankind.'⁽¹⁾ The other

(1) *Stevens v. Snow*, 3 Burr. 1237.

judges concurred in this opinion, and it seems to have been subsequently adopted by the court of common pleas.(1)

In case of a policy on a ship 'at and from Jamaica to London, warranted to sail with convoy,' where the vessel was too late for the convoy, and so did not comply with the warranty, the jury were of opinion that there ought to be an apportionment of the premium, and the part for the risk *at* Jamaica, retained, and that for the risk *from* thence to London, returned. Lord Mansfield was of the same opinion. He said that where there is a contingency in the voyage, the risk may be divided, and that the reason why there are not two policies in such cases, is, that the risk '*at*' is capable of an exact computation.(2)

In another case of an insurance on goods 'at and from Jamaica to London, warranted to depart with convoy, and to sail on or before the first of August,' the vessel sailed without convoy, whereby the insurers were discharged. The jury found that it was the invariable usage, in such cases, on this particular voyage, 'to return the premium, deducting one half per cent.' Lord Mansfield said, 'The law is clear that if the risk be commenced there shall be no return of premium. Hence questions arise of distinct risks insured by the same policy. My opinion has been to divide the risks. I am aware that there are great difficulties in the way of apportionments, and therefore the court has always leaned against them. But where an express usage is found by the jury, the difficulty is cured.'(3)

But in another case the same judge is reported to have said, 'It would be endless to go into an inquiry about the value of the risk *at Jamaica*. Nothing is said from whence it can be inferred that it was meant that there should be two risks, or by which the risk at Jamaica could be distinctly estimated.' In this case there was a warranty 'to sail on or before the first of August,' and a stipulation for the return of a part of the premium for convoy, and the vessel did not comply with the warranty. Mr. Justice Buller said, 'In all insurances from Jamaica, the policy runs *at and from*, and though in many instances the voyage has not been commenced, yet there never was an idea of any part of the premium being returned.'(4)

About sixteen years after the first decision above cited, in favour of apportionment, and about seven or eight years before the other decisions, two in favour of, and one against it; a case came before the same court upon a policy on a vessel 'at and from London to any port or place for twelve months from the 19th of August, 1776, warranted free from captures and seizures by the Americans.' The vessel was captured by an American privateer, about two months after sailing. An action was brought by the assured for a return of a part of the premium. The above case of *Stevenson v. Snow*, was cited in behalf of the assured, but Lord Mansfield said, 'In *Stevenson v. Snow*, the intention of the parties, the nature of the contract, and the consequences of it, spoke manifestly *two* insurances, and a *division* between them.' He thought, however, that the present was a case of one entire risk. He compared it to insurance on a

The premium on a voyage at and from Jamaica apportioned.

(1) *Rothwell v. Cooke*, 1 B. & P. 172; Marsh. Ins. 658.

(2) *Gale v. Mackill*, Marsh. Ins. 659; Park, 589.

(3) *Long v. Allen*, Marsh. Ins. 660; Park, 589.

(4) *Meyer v. Gregson*, Marsh. Ins. 658. decided after *Stevenson v. Snow*, but the year before *Gale v. Mackill*, and *Long v. Allen*, supra.

Insurance for a year, and capture after two months; no apportionment made.

voyage, and said, 'Though the premium is estimated, and the risk depends upon the nature and length of the voyage, yet, if it has commenced, if it be only for twenty-four hours or less, the risk is run; the contract is for the whole entire risk, and no part of the consideration shall be returned: and yet it is as easy to apportion for the length of the voyage, as it is for the time. There has been an instance put of an insurance upon a man's life where the measure is by time: in such policies there is a general exception against suicide. If a person puts an end to his life the next day or a month after, or at any other period within the twelve months, there never was an idea that any part of the premium should be returned.' He said, if the words of the policy were 'at and from, provided the ship shall sail on or before the first of August,' the underwriters would be liable to pay a loss happening before the time fixed for sailing, but, as then advised, he was inclined to be of opinion that if the vessel should not sail till after the day fixed, the premium might be apportioned, as 'there were *two* parts, or contracts of insurance, with distinct conditions. In the present case the parties might have insured from two months to two months; or in any less or greater proportion, if they had thought proper so to do; but the fact is, they have made no division of time at all; but the contract entered into is one entire contract.' Upon this ground the court were of opinion that no return of premium could be claimed.⁽¹⁾

(1) *Tyrie v. Fletcher*, Cowp. 666.

The risk to successive ports is not apportioned.

In 1781, and four years after the preceding decision, a case came before the same court on a policy upon a ship, 'at and from Honfleur to the coast of Angola, at and from thence to her port of discharge in St. Domingo, and at and from St. Domingo back to Honfleur.' In this case deviation took place in the course of the voyage from Angola to St. Domingo, by which the insurers were discharged from the subsequent risk, and the assured claimed a return of premium for the voyage from St. Domingo back to Honfleur, on the ground that the risk for that part of the voyage insured, never commenced. Lord Mansfield said, in giving the opinion of the court, 'We are all clearly of opinion that there ought not to be any return. The question depends upon this, whether the policy contains one entire risk on one voyage, or whether it is to be split into six different risks. Where the risk has never begun, there must be a return of premium, and if the voyages in this case are distinct, the risk from St. Domingo to Honfleur never began. There is no where any contingency at any period, out or home, mentioned in the policy, which happening or not happening, is to put an end to the insurance.'⁽²⁾

(2) *Bermon v. Woodbridge*, Doug. 781.

It is repeatedly laid down in the preceding cases that where no usage is proved, an entire premium cannot be divided and apportioned, unless the risks are divided in the policy, in such a manner as to show that the parties had distinct risks in contemplation. But when we come to inquire what description of the risks is a proof of such an intention of the parties, we meet with some perplexities and difficulties. Although in some of

these cases an entire premium was apportioned on account of express contingencies to which the continuance of the risks was subject, and upon which the liability of the underwriters depended, yet the cases, taken together, do not seem to warrant the opinion, that, where an entire premium is stipulated for by the parties, a return of any part of it can be claimed, if the underwriters have run any part of the risk, unless a usage to make such return is clearly proved, if it can be, even in this case.

This question has, in a few instances, come before the American courts. An open policy was made on the cargo of a vessel until her return to the United States, as interest might appear, at a rate of premium of fifteen per cent for six months. It appeared that there was a cargo on board, at different times, of the value of 5000 dollars, 1500 dollars, and 2500 dollars. It was held, in the circuit court of the United States, that the premium must be estimated on the amount at risk, and for the time during which it was at risk, though for less than six months, and this was said to be according to the general usage.(1)

(1) Polloch v. Donaldson, 3 Dall. 510.

In a case which occurred in Pennsylvania on a policy upon a cargo, from the United States to Havana, and back, it was stipulated in the policy, that 'if bills were remitted back for the whole, or a part of the sum insured, a return of seven and a half per cent on the amount so remitted' should be made. Nothing was either remitted or shipped homeward. Chief Justice Tilghman said, 'Where the voyage is entire and the risk has once commenced, there shall be no return of premium. But where, *by the course of trade*, or the agreement of the parties, the voyage is divided into distinct parts, and on one of the parts no risk has been run, there shall be an apportionment of the premium. A voyage may be entire, though a ship is to go to a number of different places, and take in a number of different cargoes. But if in the contract, there are certain contingencies introduced, which at certain periods of the voyage may operate to make the insurance void, it is considered that the voyage may be supposed to have been divided, in the contemplation of the parties, into distinct parts;' for which he refers to the opinion of Lord Mansfield in the above case of Stevenson v. Snow. And it was held by the court, that the stipulation for the return of seven and a half per cent, was a division of the risk in this policy; and that the assured was entitled to a return of that amount. Mr. Justice Yeates dissented from this opinion.(2)

(2) Donath v. Ins. Co. of N. A. 4. Dall. 463.

In New York, the court seem to have been of opinion, that, where the risk is *at and from* a place, and attaches *at* such place, there can be no return of any part of the premium, though the risk *from* the place should never be run by the insurers. The court say, 'The difficulty of apportioning the risk is insurmountable. It is impossible to ascertain the degree of risk, *without travelling out of the contract*; or how much of the premium shall be apportioned to each different part.'(3) The question of usage was not considered.

(3) Col. Ins. Co. v. Lynch, 11 Johns. 239.

It has been held in Massachusetts, that a usage of the particular place where the policy is made, will not be a ground to

claim an apportionment and return of premium. A policy was made on a cargo for a voyage from Boston to Archangel, and back to Boston, and the insurers were to take the risk on shore, as well as on board. The property insured outward was valued at 4600 dollars. The cargo arrived safe, but on account of the state of the markets, was not sold, and the vessel returned without any property on board belonging to the assured. It was proved to be the invariable practice of all the insurance offices in Boston, public and private, to return a portion of the premium on such policies, when the vessel returned without any cargo belonging to the assured, and that one half of the premium, except one per cent or one half per cent, on the amount insured, was returned; unless the risk was greater on the outward, than on the homeward voyage, in which case the sum returned was in the proportion of the part of the risk not run. It was known at the several insurance offices, that notwithstanding this usage, there had been sundry decisions of the court, establishing the right of the underwriters to the whole premium. It was also the usage to return a part of the premium on a vessel insured outward and homeward, that, on arriving at the foreign port of destination, sailed on another voyage. A president of one of the insurance companies said, that, in regard to the premium, he considered a policy out and home, to be the same as two distinct policies. It was urged in behalf of the assured, that the distinct valuation of the outward cargo, as well as the usage above stated, made this a case of two distinct risks. On the other hand, it was argued for the insurers, that the evidence of usage ought not to have been admitted, as it went to control an established principle of law: and that if proof of usage were admitted, it should be, of the usage of Massachusetts, not of one town, as of Boston. The court said, 'The law applicable to this case is plain, well settled, and generally understood. Evidence of usage is useful in many cases to explain the intention of the parties to a contract. But the usage of no class of citizens can be sustained in opposition to principles of law.'⁽¹⁾

(1) *Homer v. Dorr*, 10 Mass. R. 26.

The same usage has, however, continued since this decision. The general practice upon this usage shows that there is not any great difficulty in applying the principle of apportionment. One part of what I have understood to be the usage, is not stated in the above case, namely, when a loss, of whatever kind or amount, is claimed and paid, it is not customary to apportion the premium and return a part of it.

Section 2. Stipulations for Return of Premium.

The stipulation to return a part of the premium for safe arrival, is a conditional

Policies often contain a stipulation for a return of premium for convoy, or safe arrival, or arrival. The stipulation for a return in case of safe arrival, or arrival without any loss, is of the same character as the abatement of one or two per cent in the payment of losses; it is an enhancement of the premium in case of loss, as the abatement is an enhancement of it in general. This re-

turn for safe arrival is also of irregular operation, being the same, whether the loss is greater or less. The stipulation is very much in the nature of a wager on the safe arrival of the property, and is in some degree a departure from the principle of indemnity. Suppose an agreement to be made in all policies to return one quarter of the premium for safe arrival. In this case an additional premium ought to be given, according to the number of safe arrivals, compared with that of losses. This being ascertained in general, the wager may be made upon a fair calculation of chances; but still the stipulation is a wager, since the object of it is not to give indemnity. If the condition of the return be the arrival of the property, without regarding whether any loss has happened, the character of the stipulation is the same, with this difference only, that it must be kept in mind, in computing the amount of additional premium to be demanded, that the chances of *arrival*, are greater than those of *safe arrival*.

enhancement
of the pre-
mium.

It was agreed in a policy on sugars, that if the vessel sailed with convoy and arrived, the underwriter should return eight per cent of the premium. A part of the sugars were lost. Lord Mansfield said, 'In this stipulation, no regard is had to the condition of the goods. It does not require that all the goods should arrive *safe*.'(1)

Return for
convoy and
arrival.

(1) *Simond v. Boydell*,
Doug. 268.

In a policy on freight, it was agreed to return a part of the premium 'if the ship arrived.' The ship was captured and recaptured, and afterwards arrived, no abandonment having been made. The court decided, on the authority of the preceding case, in favour of a return premium.(2)

Return for
arrival.

(2) *Aguilar v. Rodgers*, 7 T.
R. 417.

In a policy on a ship for a voyage 'from Lisbon to Cadiz, and thence to Flushing,' the premium was 'at the rate of twenty per cent, to return eight if the ship sailed from Cadiz with convoy for England, and two more for convoy to Flushing, or ten, if with convoy for the voyage, and *arrived*.' She sailed with convoy for England, where she was condemned as enemy's property. It was held, that there should be no return of premium. Lord Ellenborough said, 'The words *and arrived*, annex a condition which over-rides and governs equally, all the several stipulations for a return of premium.'(3)

(3) *Kellner v. Le Mesurier*,
4 East, 396.

In the preceding case, the arrival was prevented by a risk not insured against; the underwriters not being liable for a seizure and condemnation by the British government. According to this case, therefore, it makes no difference whether the happening of the condition be prevented by a peril insured against or not. Another case seems to countenance this doctrine. It was agreed in the policy to return eight per cent of the premium, if the ship sailed with convoy. The ship was warranted to sail on or before the 1st of August, but did not sail within this warranty, and accordingly did not sail within the policy, or at the risk of the insurers. Yet no question is made about a return of premium, which does not appear to have been claimed.(4)

Whether a re-
turn can be
claimed if the
arrival of the
ship be pre-
vented by a
peril not in-
sured against,

(4) *Meyer v. Greyson*,
Park, 588.

But another case seems to favour the doctrine, that if the condition is prevented from happening by some peril not insu-

red against, that is, if the insurers are in the same situation they would have been in, had the condition literally taken place, the premium shall be returned. The insurance was upon goods to some port in the Baltic, 'until they should be arrived' at such port, and 'until the same should be there discharged and safely landed;' free from seizure in port, and to return a part of the premium 'for arrival.' The ship arrived at Pillau, and the goods were seized by the officers of government in the outer harbour of that port. The court doubted whether the goods had so arrived as to entitle the assured to a return of premium. They must therefore have considered *arrival* to mean a *safe* arrival, for otherwise there could be no doubt, as the goods were landed after being seized by the officers. The goods then arrived safe as to any of the perils insured against, but not so in respect to other perils. Mr. Justice Bayley said, they 'arrived safely for the purpose of exonerating the underwriters from all risks of the voyage.' And the opinion of the court was in favour of a return of premium.(1)

(1) *Dalgleish v. Brooke*, 15 East, 295.

Two decisions in New York seem to favour the opinion that the condition of a return of premium, will be construed very much in reference to the risks insured against in the policy. A vessel was insured on a voyage from New York to Teneriffe, and thence to Bona Vista and back to New York, with the provision to return one per cent of the premium 'if she did not proceed to Bona Vista, the risk ending safely.' She sailed from Teneriffe to Madeira, which being a deviation, the risk ended at Teneriffe, and safely, as respected the underwriters. A return of one per cent of the premium was recovered.(2)

(2) *Robertson v. Col. Ins. Co.* 8 Johns. 383.

The other case was on a policy from Malta to St. Petersburg, to return a part of the premium if the risk ended safely at Gothenburg. The risk ended at the Downs, where the captain gave over the voyage. This entitled the assured to the return of premium.(3) These cases do not strictly support the doctrine, that where the happening of the condition is prevented, independently of the risks insured against, the assured shall be entitled to a return of premium; but they at least establish the doctrine, that where the condition is equitably complied with, the return may be claimed, if they do not show, that where the circumstances are equivalent, as between parties, to a compliance with the condition, the same effect will follow.

(3) *Ogden v. Firem. Ins. Co.* 12 Johns. 114.

Section 3. Forfeiture of a Warranty or Condition.

Although the assured has an interest to the amount insured, exposed to the perils insured against, yet if the insurers are at no time answerable for any loss by those perils, the assured will be entitled to a return of the premium, unless he is precluded from claiming it, in consequence of some misrepresentation, concealment, or other fraudulent or unfair conduct on his part.

The case already cited, of an apportionment of the premium, where the warranty of convoy from Portsmouth to Halifax was

not complied with, shows that a forfeiture of a condition, on which the risk depends, is a ground for claiming a return of premium.(1)

(1) *Stevenson v. Snow*, 3 Burr. 1237; 1 Bl. 318.

If in consequence of a breach of warranty, without any fraud, the risk is never incurred by the insurers, the premium is to be returned. The other cases of apportionment, cited above, establish this principle, which is taken for granted in them all, the only question in each, being, whether it is applicable in the particular case.(2)

(2) *Long v. Allen, Park*, 589; *Marsh*, 660.

One condition on which the commencement of the risk depends, is the sea-worthiness of the ship. A question as to return of premium in such case arose under a policy on a vessel from Surinam, in regard to which, Chief Justice Mansfield said, 'Here is a ship kept a month at Surinam in loading, and to all appearance, in the judgment of mankind, certainly seaworthy, and if she had been burnt or sunk there, the underwriters could have made no defence. It would be very strange if the assured could say, on its being proved that the vessel was not seaworthy *when she finally sailed*, that therefore the unseaworthiness shall be carried back to her arrival at Surinam.' He accordingly takes for granted, that if the vessel had been proved to have been unseaworthy at the time when the risk was to begin, the premium must have been returned; and Mr. Justice Lawrence expressed the same opinion.(3)

(3) *Annen v. Woodman*, 3 Taunt. 299.

Mr. Justice Lawrence had expressed the same opinion, while he was one of the justices of the King's Bench. He said, 'The consideration of an insurance is paid, in order that the owner of the ship, which is capable of performing her voyage, may be indemnified against certain contingencies; and it supposes the possibility of the underwriter's gaining the premium: but if the ship be incapable of performing the voyage, there is no possibility of the underwriters gaining the premium.'(4)

(4) *Christie v. Secretan*, 8 T. R. 192.

Lord Chancellor Hardwicke expressed an opinion, that the premium should be returned, where, on account of the forfeiture of a warranty, the risk never commenced. The case was that of a warranty of the national character of the vessel.(5)

(5) *Henkle v. Roy. Ex. Ass. Co.* 1 Ves. 317.

The claim for a return of premium, in consequence of a breach of a warranty, or a forfeiture of a condition, on the part of the assured, has been more explicitly recognized in the American courts. In Massachusetts an assured demanded a return of premium on account of the unseaworthiness of a new vessel, in which an auger hole had been left open in the keel, and there were also two large worm-holes in the bottom, at the time agreed upon for the commencement of the risk. One of the judges thought that the assured ought not to take advantage of his non-compliance with an implied warranty, especially after the risk had ended; the other three judges were in favour of a return of the premium.(6) The same court afterwards decided in favour of a return of premium on account of the unseaworthiness of the vessel.(7)

(6) *Porter v. Bussey*, 1 Mass. Rep. 436.

(7) *Penniman v. Tucker*, 11 Mass. Rep. 66.

The same point has been decided in the same manner in New York. A brig warranted Danish, was condemned as French.

- (1) *Delavigne v. Unit. Ins. Co.* 1 Johns. Cas. 310. A return of premium was adjudged, the court observing, that there appeared to be no fraud on the part of the assured, and that there was no circumstance, from which they could infer that he knew the vessel not to be as warranted. (1) In a case of a similar warranty, Mr. Justice Radcliff said, 'as no actual fraud appears, the assured are entitled to a return of the premium.' (2) Mr. Justice Livingston expresses an opinion that the premium for insurance on goods, is to be returned, in case of the unseaworthiness of the vessel. (3) And the same court has held, in different cases, that a forfeiture of a warranty of national character, without any fraud, entitles the assured to a return of the premium. (4) But to give the assured this right, it surely ought to appear that the forfeiture of the condition, or breach of warranty, was such as unquestionably to have exonerated the underwriter from any liability under the policy; and that the forfeiture of the contract by the assured was so apparent, that the underwriter could not have been ignorant of it, without great negligence on his part.
- (2) *Murray v. Unit. Ins. Co.* 2 Johns. Cas. 168. See also Mr. Justice Radcliff's opinion in *Vos v. Unit. Ins. Co.* 2 Johns. Cas. 187.
- (3) *Graves v. Mar. Ins. Co.* 2 Caines 339.
- (4) *Elbers v. Unit. Ins. Co.* 16 Johns. 128. *Duguet v. Rhinelanders*, 1 Johns. Cas. 360.
- (5) *Dorr v. Pac. Ins. Co.* 7 Wheat. 611. The clause, that 'if the vessel should, upon a survey, be thereby declared unseaworthy, by reason of being unsound, or rotten,' obviously contemplates, says Mr. Justice Johnson, giving the opinion of the court, 'that a state of rottenness ascertained at any period of the voyage insured, shall be conclusive evidence of original unsoundness.' (5) If a survey is held, under this clause, to be proof of unseaworthiness at the commencement of the risk, it might raise a question as to the right to a return of premium. In a previous case, however, where the risk commenced on the 24th of October, and a report was made by surveyors on the 26th of November, Mr. Justice Cushing said, 'The defence set up is, that the vessel was unsound and rotten on the 24th of October, and it is alleged that the report of the surveyors is conclusive evidence of that fact. But the report does not apply to that time.' Mr. Justice Washington thought that the report 'applied to the 31st of October,' when the vessel sprung a leak. It is distinctly implied by the judgment of the court that the report did not apply to the time of the commencement of the risk. (6)
- (6) *Mar. Ins. Co. of Alex. v. Wilson*, 3 Cranch. 187.

Section 4. *Illegality and Fraud.*

- (7) 3 Burr. 1909. 1 Bl. 594; Park, 562. In case of fraud on the part of the underwriter, as where he underwrites, knowing of the arrival of the property, he is, on this account, under a still stronger obligation to return the premium. (7) And where the policy is void on account of his fraud, or where he knew, at the time of underwriting, that it was void, it is held by Valin, (8) Pothier, (9) and Emerigon, (10) that he is not entitled to deduct the one half per cent. Mr. Marshall cites their opinions as being law, (11) and of this there seems to be no doubt, since a party cannot have a right to retain money fraudulently obtained.
- (8) Art. 10. 16, 17. h. t.
- (9) Ins. n. 181.
- (10) Tom. 2. p. 169.
- (11) p. 677.

In all the cases where the assured has recovered back the premium, on account of the failure of the risk, by reason of the unseaworthiness of the ship, or of any forfeiture of an agreement or warranty on the part of the assured, courts have invariably made the honesty and fairness of the transaction on his part, one of the conditions on which he was entitled to recover back the premium. Where the insurance was void, on account of the concealment of a letter containing information which would unquestionably have prevented the underwriter from taking the risk, the court said, the withholding of the letter was fraudulent, and 'the insurance being avoided for such a cause, the assured is not entitled to a return of premium.'⁽¹⁾

(1) Hoyt v. Gilman, 8 Mass. Rep. 336.

If the contract be void for illegality, the assured is not in general entitled to a return of the premium. It has, however, been held, in some cases, that the premium for an illegal insurance may be recovered back. But it is not easy to distinguish precisely upon what principle some of these exceptions to the general rule depend. A policy having been made, which was void by the English statute against gaming policies, the assured, after the risk had ended, claimed a return of premium; and Lord Mansfield was at first of opinion that no return could be claimed, upon the ground that both parties were equally guilty of a breach of law, in which case the rule in *pari delicto melior est conditio possidentis*, was applicable. On the next day he expressed a doubt of this opinion, because the money had been paid upon an executory agreement, which could never be completed. He afterwards said, 'It is certainly true, in many instances, that first thoughts are best. I am now very much inclined to my first opinion. This is a gaming policy, and against the act of parliament; and therefore it is clear that the court will not interfere to assist either party.' Mr. Justice Buller said, 'If the law was mistaken, the rule applies *ignorantia juris non excusat*. There is a distinction between contracts executed and executory; and if an action is brought with a view to rescind a contract, you must do it while the contract continues executory, and then it can be done only on the terms of restoring the other party to his original situation. There was a case of *Walker v. Chapman* some years ago in this court, where a sum of money had been paid in order to obtain a place in the customs. The place had not been procured, and the party who had paid the money, having brought his action to recover it back; it was held he should recover, because the contract remained executory. So if the assured, in the present case, had brought their action before the risk was over, and the voyage finished, they might have had a ground for their demand.'⁽²⁾

(2) Lowry v. Bourdieu, Doug. 468.

In a subsequent case, the action was brought to recover a wager that the English colonies of North America would be acknowledged independent by France before a certain time. Lord Mansfield was of opinion that the wager could not be recovered against the underwriter, but he permitted a verdict to be given for the amount of the premium, on the ground that the

- (1) Wharton
v. DeLa Rive,
Park, 573.
(2) P. 6. 42. n.

policy was void, and that the insurer had money in his hands which he ought not to retain. He distinguished this case from the preceding, on the ground that the preceding was a case of a contract *executed* before the relief was applied for. (1) Mr. Marshall (2) remarks that the cases could not be so distinguished, since the last action being brought to recover the wager, the risk, if it be considered an insurance, must have previously expired, and it had in fact expired five years before.

- (3) Lacaus-
sade v. White,
7 T. R. 531.
(4) Jaques v.
Golightly, 2
Bl. 1073;
Jaques v.
Wilty, 1 H.
Bl. 65.
(5) Siffken v.
Allnutt, 1 M.
& S. 40;
Henry v.
Staniforth, 4
Camp. 270.
See also Hen-
tig v. Stani-
forth, 5 M. &
S. 122.

A case very similar to the last was afterwards brought before the same court. A party paid to another 100*l.* on condition that the other should pay him 300*l.* if peace should not take place between England and France, before the 11th September, 1797. Although this was held to be an illegal wager, it was still held that the 100*l.* might be recovered back, the court saying, 'It was more consonant to the principles of sound policy and justice, that money paid upon an illegal consideration should be recovered back, than, by denying the remedy, to give effect to the illegal contract.' (3) Upon this principle it has been held, that money paid for insuring lottery tickets may be recovered back. (4)

- (6) Oom v.
Bruce, 12
East, 225.

And Lord Ellenborough intimated an opinion, that a return of premium might be claimed where the assured should undertake an illegal trade with the public enemy, from a misconstruction of a license which he supposed to authorize the trade. (5) It is difficult to refer these cases to any principle whereby they will appear to be exceptions merely to the doctrine, that the premium of an illegal insurance cannot be recovered back, and not inconsistent with that doctrine. In a subsequent case the court stated the grounds on which the case was taken out of the general rule. Insurance was made upon goods in behalf of subjects of Russia, by their agent in London, after a declaration of war by Russia against Great Britain in 1807, but before the declaration was known in England. The insurance being void, as made in behalf of an alien enemy, a return of premium was demanded. Lord Ellenborough said, without doubt the premium cannot be recovered back, 'if the party making the insurance know it to be illegal at the time: but here the plaintiffs had no knowledge of the commencement of hostilities by Russia when they effected this insurance; and therefore no fault is imputable to them for entering into the contract; and there is no reason why they should not recover back the premium which they have paid for an insurance, from which, without any fault imputable to themselves, they could never have derived any benefit.' (6) The policy was void, on account of illegality arising from a fact not known, and that could not have been known to the assured at the time of effecting the insurance. The contract was not made with the intention of violating the law, or through ignorance or mistake of the law.

- (*) 12 Car. 2.
c. 18, s. 8.

Insurance was made in England on Russian commodities by a Swedish vessel, for a voyage from Riga to Hull. This voyage being against the navigation act, (*) could not be legally undertaken without a license. The assured had written on the 3d of

September, from Riga, to his agent in England, to obtain a license; which, on account of the delay of the letter by contrary winds, was not obtained until the 7th of October. The vessel had sailed on the 3d of that month. The voyage was accordingly illegal, and a return of premium was claimed. Lord Ellenborough, C. J. 'The assured had reasonable ground to suppose that the license would be obtained before the ship sailed; he contemplated a legal voyage. His agent in England was ignorant of the time of the ship's departure; he also contemplated a legal voyage. The illegality depended upon a fact which was not known to the parties, and was contrary to the expectation which the assured might reasonably entertain; and we think he is entitled to recover back his premium.'⁽¹⁾ But it has been held in many cases, besides that of *Lowry v. Bourdieu*, above cited, that although the policy is void on account of its illegality, and nothing could have been recovered of the underwriters, who accordingly could have run no risk, yet the premium cannot in such case be reclaimed, if the parties knew or might have known, and so must be presumed to have known, at the time of making the contract, that it was illegal. The money deposited in a wager upon the event of a horse race prohibited by statute, was paid over by the stake-holder to the winning party, with the consent of the other party. The loser brought an action to recover back the money. Lord Kenyon said, 'There is no case to be found, where, when money has been actually paid by one of two parties to the other, upon an illegal contract, both being *participes criminis*, an action has been sustained to recover it back again. Here the money was not paid on an immoral, though on an illegal, consideration. And though the law would not have enforced the payment of it, yet having been paid, it is not against conscience for the defendant to retain it.'⁽²⁾

The British statute against the exportation of wool,⁽³⁾ makes an insurance upon such an exportation void, and provides that no return of premium shall be made on the policy.

Insurance being made on a voyage to Holland, then at war with Great Britain, the policy was held to be void; but the court held that the premium could not be reclaimed, and Lord Kenyon said, 'There is no distinguishing this from a smuggling transaction, where the vendor assists the vendee in running the goods. He cannot recover back the goods themselves, or the value of them.'⁽⁴⁾

A foreigner being insured in England on a voyage from Calcutta to Copenhagen, which voyage was against the British navigation laws, the policy was held to be void, but the premium could not be recovered back.⁽⁵⁾ And a reinsurance being void as against the British statute on that subject, the same opinion was given in regard to the right of recovering back the premium.⁽⁶⁾ A similar decision was given on the right of the assured to be repaid the premium on a policy on a voyage from the West-Indies to Gibraltar, which was prohibited

(1) *Hentig v. Staniforth*, 5 M. & S. 122.

(2) *Howson v. Hancock*, 8 T. R. 575.

(3) 12 Geo. II. c. 21.

(4) *Vandyck v. Hewitt*, 1 East, 96. See *Biggs v. Lawrence*, 3 T. R. 454; *Clugas v. Panaluna*, 5 T. R. 466; *Waymell v. Reed*, 5 T. R. 599.

(5) *Morck v. Abel*, 3 B. & P. 35.

(6) *Andree v. Fletcher*, 3 T. R. 266.

(1) *Lubbock v. Potts*, 7 East, 449.

by statute, Lord Ellenborough saying, 'every person must be taken to be cognizant of the law.'⁽¹⁾

(2) *Browning v. Morris*, Cowp. 790.

It has been held in New York that the assured cannot recover back the premium paid for an illegal insurance.^(a) And upon the same principle, if a loss be paid by an underwriter, in an illegal policy, he cannot recover back the money.⁽²⁾

Section 5. *What Payment is a ground to claim Return.*

(3) *De Gaminde v. Pigou*, 4 Taunt. 246.

To give a right to claim a return of premium it is not requisite that the premium should have been literally paid, though something equivalent to payment, as between the assured and underwriters, must have been done, as it would be absurd to claim a repayment of a premium, that had not, as between the parties, been paid. A foreign merchant ordered his agent in London to effect insurance, who employed a broker for that purpose; the underwriter charged the premium to the broker, he to the agent, and he to the foreign merchant; the broker at the same time crediting the insurer for it, he having an account both with the insurer and with the agent. A return of premium becoming due, a question was made whether the premium should be considered as paid between the assured and insurer, the premium having only passed in account by the several parties, but not having been actually paid by either of them, and in the mean time the broker and the agent had both become bankrupt. It was held, that as between the assured and insurer, the premium should be considered as having been paid.⁽³⁾ It is a general rule in England that the broker is debtor for the premium, and his being so, is a payment of it as between the assured and underwriter. It has been held in Massachusetts that the assured has a right to a return of a premium for which he had given his negotiable note, which had not been paid by the maker nor negotiated by the payee, [payable to the broker probably, and including the premium for the different underwriters, there being a number of underwriters, the one of whom the premium was reclaimed being the last] though the note had not been paid or negotiated. The court said 'the underwriter expressly acknowledges the receipt of the premium; and whether it was paid to him in cash, or in merchandise, or a negotiable note, the action to recover it back will still be in the same form.'⁽⁴⁾

(4) *Hemmenway v. Bradford*, 14 Mass. Rep. 121.

(a) *Juhel v. Church*, 2 Johns. Cas. 333. It seems that in France a premium paid for an insurance, that is prohibited by law, may be recovered back; 1 Emer. 191. Poth. h. t. n. 27. and also for insurance on property of an alien enemy, which is held to be void. 1 Emer. 129.

CHAPTER XXII.

DUTY AND LIABILITY OF AGENTS AND BROKERS.

INSURANCE by private underwriters is commonly effected through the agency of a broker. Other agents, besides professional brokers, are often employed to effect policies and adjust losses, both with incorporated and private underwriters. In England generally, and in the United States frequently, where the policy is subscribed by private underwriters, the broker is agent for both the assured and insurers. The policy is generally subscribed by the insurer himself, or, in his behalf, by his attorney, specially empowered for this purpose; a more formal authority being generally given to authorize an agent to subscribe a policy, than for the purpose of authorizing any other act relating to the effecting of a policy, or the settlement of a loss.

It has been said that the consignee of goods, has authority, as such, and without any special instructions, to effect insurance.⁽¹⁾ But this would probably depend upon the particular circumstances, for it can hardly be supposed that the mere fact of consigning goods to a foreign merchant, without any orders as to insurance, would of itself be a sufficient authority upon which to effect insurance, and charge the consignor with the premium.

Where a consignee, having orders to insure, refused to comply with them, it was held that the general agent of the consignor was authorized to insure.⁽²⁾ A prize agent as such has the same authority.⁽³⁾ But the master of the vessel, merely as such, is not authorized to effect insurance.⁽⁴⁾

The subsequent adoption of an agent, and ratification of his acts, has been held to be equivalent to a previous authority. Where the captors appointed an agent to take care of the captured property, and ordered him to insure on their account, and also on account of whom it might concern; although the captors, in the particular case, had no insurable interest, the insurable interest being in the king, yet it was held that an insurance made in pursuance of such orders, and afterwards adopted and ratified by the king, was valid. The agent intended to act in behalf of whom it might concern.⁽⁵⁾ It is a general rule that where one acts voluntarily in behalf of another, intending to act as his agent, such other may adopt his acts, and thereby give him authority retrospectively.⁽⁶⁾

It has been held that one duly authorized to procure insurance is thereby authorized to make abandonment,^(a) and adjust the loss.^(b)

(a) *Ches. Ins. Co. v. Stark*, 6 Cranch, 268; *Wolff v. Horncastle*, 1 B. & P. 316; *Dutlgh v. Gatliff*, 4 Dall, 447. See also *Parker v. Towers*, 2 Browne App. 80. (b) *Richardson v. Anderson*, 1 Camp. 43. n.

(1) *Lucena v. Craufurd*, 2 N. R. 269.
(2) *Wolff v. Horncastle*, 1 B. & P. 316.
(3) *Craufurd v. Hunter*, 8 T. R. 23.

Whether a consignee, as such, has authority to insure.

(4) *French v. Backhouse*, 5 Burr. 2727; *Craufurd v. Hunter*, 8 T. R. 23.
(5) *Routh v. Thompson*, 13 East, 274.

Subsequent ratification of an agent's acts is equivalent to a previous authority.

(6) *Dorr v. N. E. M. Ins. Co.* 4 Mass. Rep. 232; *Un. Ins. Co. v. Robinson*, 2 Caines, 284; *Abbott v. Broome*, 1 Caines, 303.

An agent to procure insurance is such to abandon

Possession of the policy.

(1) *Shee v. Clarkson*, 12 East, 511.

(2) *Bethune v. Neilson*, 2 Caines, 139. Mr. Justice Livingston dissented.

An authority to subscribe, is such to adjust a loss

(3) *Richardson v. Anderson*, 1 Camp. 4. n.

(4) *Smith v. Cologan*, 2 T. R. 188. n.

(5) *Snook v. Davidson*, 2 Camp. 218.

(6) *Randolph v. Ware*, 3 Cranch. 503.

In what cases a correspondent is obliged to obey an order to insure.

The possession of the policy is held to be a sufficient authority for receiving the loss, at the time of its becoming payable, according to the terms of the policy.(1) But where the policy remained in the hands of the agent, by whom it was effected, at the time of the proof of the loss, and afterwards; but was taken out of his hands by the assured before the expiration of the thirty days of credit for the loss; it was held that the possession of the policy was not an implied authority to settle and receive the loss before the expiration of the thirty days; and, therefore, that the insurer, though he had settled the loss with the agent, while the policy was in his hands, was still liable to pay the loss to the assured.(2)

So in regard to the agent of the insurer, an authority to sign the policy, has been held to be an authority to adjust the loss.(3) Where the broker substitutes another agent, who is adopted by the principal, the broker ceases to be responsible, and the substituted agent thereby becomes the direct representative of the principal. Brokers residing in London, employed another at Newcastle, to effect a policy, and the assured afterwards corresponded, concerning the recovery of the loss, directly with the Newcastle broker, to whom the loss was paid by the insurers; but before paying over the amount to the assured, he became bankrupt. The assured then claimed the amount against the London brokers, but Mr. Justice Buller said, 'If he had intended to insist on his right to recover the money of them, he should not have looked to the other broker at all.'(4)

If a broker substitutes another broker, informing him who the principals are, the principals have a right to consider the substituted broker, their immediate agent. A broker being ordered to effect insurance, employed other brokers for this purpose, telling them that the policy was for a correspondent in the country, and the policy was filled up in the names of those correspondents. It was held that these brokers had not a lien on the policy for the general balance due from the other broker who employed them.(5)

One Evans, being the general agent of Farrel and Jones, an English house, was instructed by Randolph, an American shipper, to get a quantity of tobacco insured; which he undertook to do. He neglected to do it, and the shipper claimed damages against the English house; that is, he wished to consider the English house as his agents for procuring the insurance. Mr. Justice Washington said, 'I think that Evans having neglected to comply with his promise to insure, did not make Farrel and Jones liable, although it made *him* personally liable. He was the agent of Randolph.'(6)

One man cannot compel another to be his agent, but two persons may stand in such a relation to each other in consequence of their previous transactions, that the owner of property may be authorized to expect and require of his correspondent, to act as his agent in effecting insurance, without any previous express agreement relating particularly to this subject. Mr. Justice Buller says, 'There are three instances in which the orders to insure for a correspondent abroad must be obeyed: 1. Where

the merchant abroad has effects in the hands of his correspondent here; 2d. if he has been used to send orders for insurance, and the correspondent here to comply with them, he has a right to expect his orders will be obeyed, unless he has notice to discontinue that course of dealing; 3d. if he send bills of lading with orders to insure, the correspondent here must obey the orders, if he accept the bills of lading, for it is one entire transaction.⁽¹⁾ Although orders are given to insure, among others, against one risk in regard to which the insurance would not be valid, still, if the policy would not be thereby void, but would protect the property against the other risks, the orders are binding, notwithstanding that they include one risk which cannot be lawfully insured against.⁽²⁾

It is the duty of a broker or agent, who undertakes to effect a policy, to make no representation otherwise than he is instructed, or than the facts will justify; and to procure a valid policy, conformable to his instructions, and subscribed by underwriters of good credit. Although the agent may be under no obligation to comply with the order to get insurance, yet if he undertake it, he will be answerable for the due execution of the order;⁽³⁾ and although he undertakes the agency voluntarily, without receiving or expecting any commission, he is not the less answerable for doing well, what he undertakes.⁽⁴⁾

If an agent neglects to procure insurance, or if, through his fault, the policy is not conformable to the orders, or such as the principal had a right to expect, the agent is liable for the damage; by neglecting to get insurance, or by executing the order defectively, he puts himself in the place of an underwriter, and must pay the loss, or the part of it, for which the underwriter is not liable, but for which he would have been liable, had the policy been made according to the instructions, or in such manner as the principal had a right to expect and require.⁽⁵⁾ If the policy is void from a misrepresentation made by the agent through his own fault, he must pay the loss for which the insurer would otherwise have been liable.^(a) Where the agent employed another broker, but neglected to give him a letter containing facts material to be disclosed to the insurers;^(b) and where he neglected to include the premium in the amount insured,^(c) the agent was held to be liable to his principal for the amount which might have been recovered from the underwriters, had the insurance been properly effected. The agent is entitled to make the same defence to a suit by the principal, that the insurer could have made under the policy.^(d) The owner of a vessel wrote to his correspondent to make insurance, stating that the vessel would sail as soon as the frigates; 'calculating to take advantage of their protection.' She sailed before the frigates, and was captured. The agent had made no insurance, but the court held him not to be liable, for

(1) *Smith v. Lascelles*, 2 T. R. 187. See also *French v. Reed*, 6 Binn. 308; *De Taster v. Crousillat*, *Condy's Marsh.*, 301. n.; *Morris v. Sumner*, *Condy's Marsh.*, 301. n.

Duty of the agent in effecting insurance.

(2) *Glaser v. Cowie*, 1 M. & S. 52.

(3) *French v. Reed*, 6 Binn. 308.

The effect of the agent's neglect.

(4) *Wilkinson v. Coverdale*, 1 Esp. 75; *Wallace v. Tellfair*, 1 Esp. 76; *Seller v. Work*, *Marsh.*, 299.

(5) *Delaney v. Stewart*, 1 T. R. 22; *Wilkinson v. Coverdale*, 1 Esp. 75; *Wallace v. Tellfair*, 1 Esp. 76; *Harding v. Carter*, *Park*, 4; *Webster v. De Taster*, 7 T. R. 157; *Miner v. Tagert*, 3 Binn. 204.

(a) *Pawson v. Watson*, *Cowp.* 785. (b) *Seller v. Work*, *Marsh.* 299. (c) *Glaser v. Cowie*, 1 M. & S. 52. (d) *Wilkinson v. Coverdale*, 1 Esp. 75; *De Taster v. Crousillat*, *Condy's Marsh.* 301. n.

(1) *Alsop v. Coit*, 12 Mass. Rep. 40.

if he had effected a policy, with a warranty that the vessel would sail with the frigates, as he was authorized to do, nothing could have been recovered against the underwriters, under the policy.(1)

(2) *Smith v. Cologan*, 2 T. R. 188. n.

It has been made a question, whether an agent is bound, under a general order, to effect insurance, to do any thing extraordinary, and more than is usual, for the purpose of effecting a policy. A London house having orders to get insurance on a vessel, applied at Lloyd's for the purpose, where the risk was refused, because the vessel was not registered there; upon which Mr. Justice Buller said, if the agents 'had gone no further, it might have been a doubt whether they would have been liable, for if a person do what is usual to get insurance made, that is sufficient. He is not obliged to get insurance at all events.'(2) But it would obviously not be safe in an agent to limit himself very strictly within this doctrine.

(3) *Sanchez v. Davenport*, 6 Mass. Rep. 258. See also *Wallace v. Tellfair*, 2 T. R. 188. n.

But where the agent could not procure insurance in the place of his residence, or any neighbouring place, at the premium to which he was limited by his principal, he was held not to be liable in consequence of not effecting a policy.(3)

It has been held to be sufficient, if the agent has no particular instructions, if he effects insurance in any usual form. A merchant of Alicant requested his correspondent in London, without giving him any particular instructions, to effect insurance on a cargo of fruit, which the agent caused to be insured, by the London Assurance Company, *free from particular average*. The fruit was mostly lost, but the loss came within the exception, and so was not covered by the policy. There were said to be two offices in London, where fruit was insured without this exception. The loss was claimed against the agent. Lord Mansfield said, that to make him liable, he 'must be guilty either of a breach of orders, gross negligence, or fraud. The plaintiff, if he pleased, might have given orders not to insure at the London Assurance-Office, but at some other, where this exception would not have been insisted on. But he gives no such directions at all. Therefore he left it to the discretion of his correspondent, who, if he meant no fraud, was at liberty to elect between the underwriters.'(4)

(4) *Moore v. Mourgue*, Cowp. 579.

The insurance must be according to the custom of the trade.

(5) *Mallough v. Barber*, 4 Camp. 150.

The policy must be made strictly conformable to instructions.

The broker must effect the policy according to the custom in the particular voyage. Brokers were ordered to effect insurance 'at and from Teneriffe to London.' Many brokers testified, that under such an order, and without any particular instructions for the purpose, it was the invariable practice to insert, 'liberty to touch and stay at all, or any, of the Canary Islands.' Lord Ellenborough held, that the brokers were liable for damage arising from the omission of this liberty in the policy.(5)

A broker in London, was directed by his correspondent at Malaga to insure goods from Gibraltar to Dublin, the correspondent saying, 'I take the risk on myself from this to Gibraltar Bay, where I shall send my letters on shore.' The broker effected a policy 'on goods at and from Gibraltar to Dublin.' Gibbs, C. J. 'A broker is bound to have knowledge and dili-

gence, and must execute his orders. If the instructions were doubtful, I should think the principal not entitled to recover. But I think the latter not doubtful. It was understood, that the goods were to be shipped at Malaga, and the broker ought not to have effected a policy which can only attach on goods shipped at Gibraltar. (1)

(1) *Park v. Hammond*, 1 Holt, 80; S. C. 4 Camp. 344; 2 Marsh. Rep. 189; 6 Taunt. 295.

A misstatement of facts by a consignor and vendor of goods, may have the effect of making him stand as insurer. Where the consignor and vendor made such a representation to the consignee and purchaser, that an insurance upon the representation would have been void, it was held that the consignor thereby made himself insurer, and the goods being lost by the perils usually insured against, he was not entitled to recover the price of them. (2)

A misrepresentation by a consignor may render him liable as insurer.

(2) *Arnot v. Stewart*, 5 Dow, 274.

An agent is liable if he cause a policy to be cancelled without authority. The sum of 3000*l.* being insured by a valid policy, upon the life of a person absent at sea, his agent, supposing that it had been effected through mistake as to the amount, had the policy cancelled, and procured another for a smaller sum. But it appeared that the amount had been insured without any mistake. The person, whose life was insured, died during the period of the risk. The agent, by cancelling the first policy, under these circumstances, was held to be liable as insurer; on the ground that he had no sufficient reason to suppose that there had been any mistake. (3)

(3) *Gray v. Murray*, 3 Johns. Chan. Rep. 87. (4) *Bousfield v. Creswell*, 2 Camp. 545.

If the policy remains in the hands of the agent, he is bound to use reasonable diligence to obtain payment of the loss. (4) He is answerable for a mistake of his principal's orders, through haste or carelessness. Where the assured instructed his agent upon what terms he would adjust the loss, and the agent, by a hasty reading of the instructions, mistook them, and settled the loss upon different terms, he was held to be answerable. (5)

The duty of an agent in procuring payment of a loss.

(5) *Rundle v. Moore*, 3 Johns. Cas. 36.

Payment to an authorized broker, is payment to his principal. (6) A broker settled a loss which had become due, by taking the underwriter's bill at a credit of three months. This was held to be payment to the broker, and made him immediately liable to the assured for the whole amount of the loss. (7) But where the insurers initials were struck out of the adjustment in token of payment, and the broker had charged the loss to the insurer, Lord Ellenborough said, 'The assured is never estopped from demanding the money, unless there is actual payment to the broker, or a credit given.' (a)

What is payment to the broker.

(6) *Erick v. Johnson*, 6 Mass. Rep. 193.

(7) *Wilkinson v. Clay*, 6 Taunt. 110; S. C. 4 Camp. 171.

In England, as has been already mentioned, (8) the broker is generally considered to be debtor to the underwriter, for the premium. But in the United States there is no distinction, in this respect, between an insurance broker or an agent for effecting insurance, and any other broker or agent. The broker may become a debtor to the insurer, or a creditor to the assured, for the premium, in virtue of an agreement to this effect, (b) or by holding himself out as principal, he is liable to be so consi-

(8) *Supr.* 78.

(a) *Jell v. Pratt*, 2 Starkie, 67. (b) *Taylor v. Lowell*, 3 Mass. Rep. 352; *Supr.* 79. See also *Bethune v. Neilson*, 2 Caines, 139.

(1) *Rabone v. Williams*, 7 T. R. 356. n.; *Maanas v. Weldon*, 1 East, 335. dered by the party with whom he contracts.(1) And the party with whom he contracts is entitled to all the advantages of considering him as principal. White and Lubbern, merchants in London, directed their brokers to effect insurance upon a cargo without making known that the cargo did not belong to themselves. The cargo in fact, belonged to a merchant at Rostock, to whom it was shipped. A loss happened, which the insurers paid to the brokers. Lord Ellenborough said, 'The brokers having had no notice that the policy was not for White and Lubbern, they had a lien upon it for their general balance. They must be supposed to have made advances on the credit of the policy, which was allowed to remain in their hands.' Accordingly, the brokers were held liable to pay over to the assured only the excess, after satisfying their own demands against White and Lubbern.(2)

(2) *Mann v. Forrester* 4 Camp. 60. See also *Westwood v. Bell*, 1 Holt, 122.

(3) *Bowne v. Shaw*, 1 Caines, 489.

In the United States this rule would be applicable between the broker or agent, and the underwriter.(3) If the agent discloses his principal, and does not render himself liable by any special agreement, it does not appear that either of the parties has a right to consider him as principal, in respect to any part of the transaction. In the United States the premium note is generally made payable to the broker, where the policy is made in a private office.

(4) *Edgar v. Bumstead*, 1 Camp. 411.

Where a broker paid a loss, not knowing that the insurer had previously become bankrupt, Lord Ellenborough said, 'According to the well known course of dealing between the broker, underwriters, and assured, the money could not be recovered back.'(4)

(5) *Jameson v. Swainstone*, 2 Camp. 546. n.

A broker paid a loss, and two years afterwards claimed repayment of the money, alleging that he had not been able to recover the loss from the insurers. Sir James Mansfield said, 'After so great a lapse of time the broker must be presumed either to have received actual payment, or to have settled with the underwriters in some way or other.'(5)

(6) *Shoemaker v. Smith*, 2 Binn. 239.

Where a broker paid the premium to the underwriter, after notice from the assured not to pay it, as the property had not been put at risk, it was held that he could not recover it from the assured.(6)

The rights of lien and set-off are of importance to insurance brokers and agents, but the particular consideration of these subjects is omitted, as not coming within the plan by which this treatise is limited.

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Note.

It ought to be mentioned, that since this work went to the press, an inaccuracy has been pointed out to me on page 56, in specifying the interest in fishing voyages, which is corrected in the *errata*. I have been told, also, that the statement on page 257, respecting the practice of paying for losses, occasioned in keeping off from a lee-shore, is too broad and general. The reader is referred to page 336, on that subject. The statement at the bottom of page 371, respecting a deduction of one third from commissions and marine interest allowed for supplying funds to make repairs, as I have learned since the passage was printed, is not strictly accurate as a matter of practice, and the point seems to be questionable upon principle.

Errata.

- Page 47, line 7, for 'principal,' read 'principle.'
- Page 56, line 3, after 'owners,' read, 'and charged partly to the master and hands in the proportion of their interest in the proceeds of the voyage.'
- Page 293, line 5, after 'having,' read, 'been.'
- Page 300, line 31, for 'Gibbs,' read, 'Abbott.'
- Page 356, in margin for '7 Mass. Rep.' read, '9 Mass. Rep.'
- Page 371, line 7, from bottom, omit from 'If commissions, &c.' to end of paragraph.
- Page 375, n. for 60, read 48—for 150, 120—for 375, 345—for 225, 285—and for 343.66, 343.75.
- Page 392, line 21 from bottom, after 'does,' read 'not.'
- Page 429, margin, after 'Ins. Co.' read, '15 Mass. Rep. 341.'

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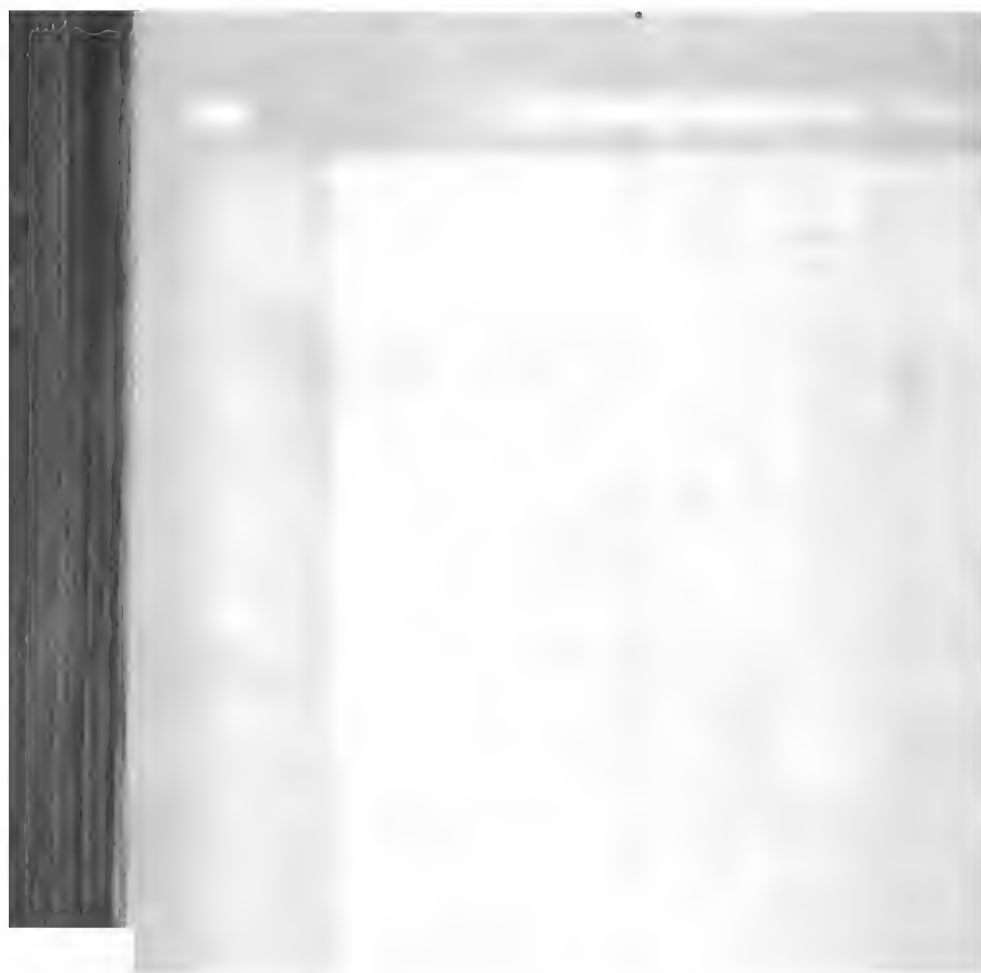
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